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Note

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I. INTRODUCTION

Since the early years of the Republic, legislators have redrawn electoral districts to achieve the greatest benefit to their political party, but recently this practice has become more malicious.[1] For example, in the 2002 Congressional elections, 356 out of the 435 House of Representatives members' districts were decided by margins of more than twenty percent and only four incumbents who faced non-incumbent challengers were defeated.[2] Only in the last forty years has the judiciary entered the political thicket of apportionment.[3] Despite the

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1. *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004) (providing one example of the actions of the Governor and state legislature of Texas creating a new electoral map simply based on political considerations and not on new census data or a judicial order).

2. Fred Hiatt, *Time to Draw the Line*, WASH. POST, May 3, 2004, at A21.

3. *See infra* Part II.C (outlining the Court's role in apportionment related issues). The Court first entered into the political thicket of apportionment in *Baker v. Carr*, 369 U.S. 186 (1962); *infra* Part II.C.1 (discussing the decision in *Baker* and its aftermath). In subsequent decisions, the Court established the one person, one vote standard to resolve apportionment disputes. Reynolds v. Sims, 377 U.S. 533, 568 (1964). Based on Fourteenth Amendment grounds, the Court affirmed that equal numbers of voters should elect equal numbers of representatives. *Id.* at 560–61; *infra* Part II.C.2 (discussing the one person, one vote standard and the relevant cases). Beyond the mathematical formula of one person, one vote, the Court developed the concept of fair and effective representation when dealing with apportionment issues such as racial or partisan gerrymandering. *See infra* Part II.C.3 (discussing the concept of fair and effective representation); *infra* Part II.C.4 (discussing the development of racial gerrymandering jurisprudence).

United States Supreme Court's activity, the Court has largely avoided the apportionment-related issue of partisan gerrymandering.[4] In 2002, a federal district court faced the issue of partisan gerrymandering in *Vieth v. Pennsylvania,*[5] where Pennsylvania Democrats brought suit alleging that the Pennsylvania Legislature's redistricting plan violated their constitutional rights.[6]

The case eventually reached the United States Supreme Court, and commentators viewed it as one of the more important cases in recent memory.[7] However, the Court failed to live up to expectations.[8] A fractured Court wrote five opinions, ultimately dismissing the claim.[9] A four-Justice plurality dismissed the political gerrymandering claim, holding it was a non-justiciable political question.[10] The five other Justices disagreed as to the plurality's view of justiciability, but failed to establish a majority standard for the lower courts.[11] Instead of resolving an important problem facing the nation, the Court created greater

4. *See infra* Part II.D (discussing the Court's history with partisan gerrymandering). The Court's major decision dealing with partisan gerrymandering occurred in *Davis v. Bandemer*, 478 U.S. 109 (1986). A majority of six Justices determined partisan gerrymandering justiciable. *Bandemer*, 478 U.S. at 119–20. The Court found plans that dilute the vote of political groups to be constitutionally suspect. *Id.* However, the Court failed to establish a majority standard to adjudicate these claims. *Id.*; *see infra* Part II.E. (discussing *Davis v. Bandemer*).

5. Vieth v. Pennsylvania, 188 F. Supp. 2d 532 (M.D. Pa. 2002).

6. *Id.* at 534. A number of Pennsylvania Democrats alleged the new state congressional redistricting plan violated the one person, one vote requirement and that it constituted an unconstitutional partisan gerrymander. *Id.* at 536. The complaint stated that the plan trampled the protections of the First and Fourteenth Amendments. *Id.* at 537. A three-judge district court initially found the plan unconstitutional, but a revised plan passed constitutional muster. *Id.*

7. Vieth v. Jubelirer, 124 S. Ct. 1769 (2004). *See* J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47, 51 (2004) ("*Vieth* may be one of the most revealing and important voting cases since *Baker v. Carr.*"); Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER, Dec. 8, 2003, at 63. ("[*Vieth*] could well become the court's most important foray into the political process since Bush v. Gore.").

8. Charles Lane, *Justices Order New Look at Tex Redistricting Case, GOP-Crafted Plan Stays in Effect for this Election*, WASH. POST, Oct. 19, 2003, at A21. "[*Vieth*] was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." *Id.* (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles); John B. Anderson & Robert Richie, *A Better Way to Vote*, LEGAL TIMES, May 17, 2004 (arguing that the Court could have taken dramatic action that would have established an unambiguous standard for the country).

9. *Vieth*, 124 S. Ct. at 1773. Justice Scalia announced the judgment of the Court and delivered an opinion. *Id.* Justice Kennedy filed an opinion concurring in the judgment. *Id.* at 1792. Justices Stevens, Souter and Breyer each filed separate dissenting opinions. *Id.* at 1784; *see infra* Part III.C (discussing the opinions of the Justices).

10. *Vieth*, 124 S. Ct. at 1773. Justice Scalia wrote for the plurality, in which the Chief Justice and Justices O'Connor and Thomas joined. *Id. See infra* Part III.C.1 (discussing the plurality opinion); *infra* Part II.B (discussing the concept of non-justiciable political questions).

11. *See infra* Part III.C.2 (discussing the concurring opinion of Justice Kennedy); *infra* Part III.C.3 (discussing the dissenting opinions of Justices Stevens, Souter and Breyer).

confusion and prolonged the fight over partisan gerrymandering.[12] In the short term, the *Vieth* decision will alter neither the acts of the partisan gerrymander nor the struggle to stop it.[13] Regardless, the decision did open new avenues to explore the creation of judicially manageable standards.[14]

Part II of this Note will provide an overview of partisan gerrymandering in the United States and the concept of the political question doctrine.[15] Part II will also explain the development of judicially manageable standards used to adjudicate claims related to apportionment.[16] Part III will discuss the plurality, concurring, and dissenting opinions from the United States Supreme Court's decision in *Vieth v. Jubelirer*.[17] Part IV will argue that the dissenting Justices correctly held partisan gerrymandering is not a political question.[18] Part IV will reason that Justice Stevens's dissenting opinion provided the best judicially manageable standard with which to resolve partisan gerrymandering disputes.[19] Part V will examine the effects that *Vieth* created for lower courts struggling to resolve partisan gerrymandering cases.[20] This Note will conclude by asserting that *Vieth* failed to provide a resolution, but laid a foundation for one in the future.[21]

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12. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004); *see infra* Part IV (analyzing the decision in *Vieth*).

13. *See infra* Part V.A (discussing the short term impact of *Vieth*); *infra* note 425 (discussing the Supreme Court decision of *Cox v. Larios*, 124 S. Ct. 2806 (2004), rendered shortly after *Vieth*, which dealt with legislative apportionment).

14. Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated by*, 1235 S. Ct. 351 (2004) (involving the longstanding feud over the redistricting plan in Texas). The Supreme Court ordered a three-judge panel to take into account the *Vieth* decision and review the court's decision allowing a gerrymandered congressional districting plan to be implemented. Charles Lane, *Justices Order New Look at Texas Redistricting Case*, WASH. POST, Oct. 19, 2003, at A21. *See infra* Part V.B (discussing the long term impact of *Vieth*); *infra* note 61–62 & 435 (discussing the *Session* decision).

15. *See infra* Part II (outlining the concept of gerrymandering and the doctrine of political question).

16. *See infra* Part II (discussing the development of judicial standards dealing with gerrymandering and apportionment claims).

17. *See infra* Part III.C.1 (discussing the plurality opinion in *Vieth*); *infra* Part III.C.2 (discussing the concurring opinion in *Vieth*); *infra* Part III.C.3 (discussing the dissenting opinions in *Vieth*).

18. *See infra* Part IV.A (analyzing the correctness of the dissenting opinions).

19. *See infra* Part IV.C (analyzing Justice Stevens's dissenting opinion).

20. *See infra* Part V (discussing the effects of *Vieth* upon lower courts attempting to adjudicate partisan gerrymandering claims).

21. *See infra* Part V (explaining how Court precedent provided the foundation to develop manageable standards).

II. BACKGROUND

The development of partisan gerrymandering jurisprudence in the United States laid the foundation for the Court's decision in *Vieth*.[22] This Part will explain the path the Court reached in declaring partisan gerrymandering justiciable and the Court's struggle with establishing standards of review.[23] Part II.A will provide a brief history of partisan gerrymandering in the United States.[24] Part II.B will discuss the political question doctrine, a doctrine used for many years to exclude partisan gerrymandering from judicial review.[25] Part II.C will trace the judicial steps of creating manageable standards that ultimately lead to the decision in *Vieth*.[26] Part II.D will review the Court's treatment of the partisan gerrymander before it was declared justiciable.[27] Part II.E will explore the Supreme Court decision of *Davis v. Bandemer*,[28] which made partisan gerrymandering judicially reviewable, and its effect on partisan gerrymandering claims.[29]

A. The Gerrymander in the United States

While the Court's role in gerrymandering disputes developed only in the last forty years, gerrymandering has been part of the United States' political process since the Nation's founding.[30] Part II.A.1 will define the concept of gerrymandering.[31] Part II.A.2 will review the history of gerrymandering in the United States.[32]

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22. *See infra* Part II (discussing the development of apportionment law jurisprudence).

23. *See infra* Part II.A–E (discussing the history of gerrymandering in the United States and the courts' attempts to develop judicial standards to counter the harms).

24. *See infra* Part II.A (discussing the history and the concept of gerrymandering in the United States).

25. *See infra* Part II.B (discussing the political question doctrine).

26. *See infra* Part II.C (discussing the application of judicially manageable standards to apportionment and other election disputes involving the Equal Protection Clause).

27. *See infra* Part II.D (reviewing the first Supreme Court cases dealing with partisan gerrymandering).

28. Davis v. Bandemer, 478 U.S. 109 (1986).

29. *See infra* Part II.E (discussing *Davis v. Bandemer*, which established that partisan gerrymandering claims were justiciable, and lower court decisions attempting to apply the *Bandemer* standards).

30. ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER (Leon Stein ed., AmoPress 1974) (1907) (providing a comprehensive history of gerrymandering from the colonial period until 1842 and the advent of wide-spread use of single-member districts in the United States).

31. *See infra* Part II.A.1 (discussing the general concept of gerrymandering and its impact on elections).

32. *See infra* Part II.A.2 (discussing the history of gerrymandering in the United States).

1. What is a Gerrymander?

Gerrymandering is the method of creating electoral districts that provide the greatest electoral benefit to the political party drawing the boundaries.[33] It is normally viewed as a dishonest activity and has been criticized for a variety of reasons.[34] The main criticism arising from the actions of the gerrymander is the ability of the minority to dilute the will of the majority.[35] The scope of what gerrymandering encompasses is not always clear.[36] Traditionally, the power of apportionment has been

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33. Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas J., concurring) (describing gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"). "[G]errymandering should be taken to encompass *all* apportionment and districting arrangements which transmute one party's actual voter strength into the maximum of legislative seats and transmute the other party's actual voter strength into the minimum of legislative seats." ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 460 (1968).

34. GRIFFITH, *supra* note 30, at 8 ("One of the most unpatriotic acts of legislation possible is a gerrymander."). Griffith argues gerrymandering is "a species of fraud, deception, and trickery which menaces the perpetuity of the Republic of the United States . . . for it deals . . . with representative government." *Id.* at 7. Griffith viewed gerrymandering as evil because "it is cloaked under the guise of law" and "[a] political injustice is given the stamp of government and is embodied in a law." *Id.* at 8.

35. *See id.* at 21 (viewing gerrymandering as "a system of political discrimination"). Griffith viewed gerrymandering as a fraudulent political trick, which can destroy the principles of republican government. *Id.* at 7. For Griffith, gerrymandering is a "flagrant wrong that threatens the perpetuity and stability of our political institutions." *Id.*; *see also* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (discussing the various criticisms of gerrymandering and specifically partisan gerrymandering). *But see*, MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 3 (1993) (arguing the real difficulty is the Court's idea that political groups are entitled to equal representational opportunities despite the inequalities inherent in a winner-take-all single-member district system).

> "[I]n [a single member plurality district] system, the opportunity to be represented is for all intents and purposes the opportunity to vote with a group of like-minded voters large enough to be a majority in a given district. When, therefore, does losing become tantamount to denial of representational opportunity?"

Id.

36. BLACK'S LAW DICTIONARY 708 (8th ed. 2004) (defining gerrymandering as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."); *see* Robert G. Dixon, Jr., *The Court, The People, and "One Man, One Vote"*, *in* REAPPORTIONMENT IN THE 1970S 29 (Nelson W. Polsby ed., 1971) [hereinafter Dixon, *One Man, One Vote*] ("Gerrymandering is simply discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another."); ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 46 (1963) ("Gerrymandering in short, is the art of political cartography."). The term gerrymander incorporates a number of meanings. Gordon E. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, *in* REAPPORTIONMENT IN THE 1970S 122 (Nelson W. Polsby ed., 1971). A silent gerrymander is when the legislature fails to redistrict at all, which was the situation in *Baker v. Carr*, 369 U.S. 186 (1962). *Id.*; *see infra* Part II.C.1 (discussing the Supreme Court case of *Baker v. Carr*). An incumbent-protecting gerrymander or bipartisan gerrymander arises when leaders of both parties agree to create districts in order "to preserve or enhance the electoral

part of the legislative branch and controlled by the political party in power.[37] Usually, those charged with creating voting districts create districts that give a benefit to a specific group in elections.[38] These districts are labeled gerrymandered when they do not conform to traditional districting principles.[39] Districts are usually gerrymandered on the basis of race or politics.[40] Occasionally, gerrymandering can be

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prospects of current officeholders." GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 18 (2002). Nevertheless, the most notorious type of gerrymander happens when district lines are created in a manner that benefits the party or faction in charge of the process. Baker, *supra*, at 131. Mark Rush concluded that gerrymandering is a problematic concept because of ambiguity regarding: (1) the identity of the injured parties; (2) the meaning of representation; and (3) what constitutes a denial of the fair opportunity to be represented. RUSH, *supra* note 35, at 2. A number of models have been established in an attempt to assess fair representation. *Id.* at 59 (discussing some standard criteria used to assess gerrymandering).

37. Dixon, *One Man, One Vote*, *supra* note 36, at 35. "[T]he responsibility for revising election districts is almost always placed, at least initially, with an elected legislative body." Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, *in* FAIR AND EFFECTIVE REPRESENTATION? 7 (Mark E. Rush & Richard L. Engstrom eds., 2001). Redistricting is the redrawing of district lines, usually maintaining the same number of electoral districts. RICHARD K. SCHER ET AL., VOTING RIGHTS & DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING 4 (1997). Reapportionment implies a change in the number of seats, as well as the redrawing of lines. *Id.* The U.S. House of Representatives, state legislatures, and many local legislatures are based on the idea of equal representation of the population, which requires continual reapportionment to ensure population equity is achieved. *Id.* The creation of Congressional district boundaries occurs in two phases. DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 43 (1992). The first phase is the constitutionally and statutorily mandated decennial U.S. census, which measures changes in the population. SCHER, *supra* at 4. After the census is completed, the number of Congressional seats are allotted based on population to the fifty States. *See* BUTLER & CAIN, *supra*, at 43–46 (describing the mathematical formulation used to allocate Congressional seats). Next, the States adjust the congressional district boundaries to comply with the allocation. *Id.* at 44.

38. *See* Dixon, *One Man, One Vote*, *supra* note 36, at 29 (considering all redistricting to involve gerrymandering); *see also* Robert N. Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1, 3 (1973) ("The gerrymander problem obviously arises from our geographic base for political representation.").

39. *See* SCHER, *supra* note 37, at 40 (listing principles involved in the redistricting and reapportionment process). Traditional districting principles include minority fairness, political fairness, contiguity, compactness, preservation of communities of interest, continuity of representation and district cores, avoidance of pairing, and respect for political boundaries and topographical features. *Id. See also* J. Gerald Hebert, *The Realists' Guide to Redistricting*, 2000 A.B.A. SEC. ADMIN. L. & REG. PRAC. 59–65 (describing the different traditional districting principles). However, not all commentators believe these traditional principles are necessary in order to provide proper representation. *E.g.*, Dixon, *One Man, One Vote*, *supra* note 36, at 29–30 (owing to modern technology, the standards of contiguity and compactness are not as necessary as the other principles to achieve legitimate representation).

40. NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING TASK FORCE, *at* http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part2.htm (updated Oct. 31, 2003) [hereinafter Redistricting Task Force] (discussing the concept of racial gerrymandering); *see* Lewyn, *supra* note 35, at 405 (defining partisan gerrymandering as "gaining through

used as a positive tool when serving the interests of historically under-represented minority groups.[41] In these cases, the inherent evil of gerrymandering must be tempered with the historical need to empower under-represented groups.[42]

Two techniques are employed to gerrymander districts: packing and cracking.[43] Packing occurs when the boundaries of an electoral district are changed in order to create an area that incorporates a majority of people who vote in a similar way.[44] Packing "wastes" votes by creating a few districts with super-majorities of like-minded voters, making it easier for the party in power to win or maintain control in the majority of the other districts.[45] Cracking arises when an area with a high concentration of similar voters is split among several districts, ensuring that these voters have a small minority in several districts rather than a large majority in one, thereby diluting the voting power of the group.[46] Regardless of the method employed, the outcome of gerrymandering is

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discretionary districting an unjustifiable advantage for one political party as opposed to the others.") (quoting Charles Backtrom et al., *Issues in Gerrymandering: An Explanatory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 (1978)).

41. Redistricting Task Force, *supra* note 40 (discussing the use of gerrymandering to benefit minority voters). This type of gerrymandering, such as the creation of minority-majority districts, is done when electoral districts are developed in order to redress a long overlooked imbalance in representation of minority groups. T. Thomas Singer, *Reappraising Reapportionment*, 22 GONZ. L. REV. 527, 533–34 (1987); *see infra* Part II.C.4 (discussing the impact of affirmative action racial gerrymandering on minorities).

42. *See* Singer, *supra* note 41, at 533–35 (discussing the Voting Rights Act of 1965 and the Court's attempt to protect minority representation). This balancing act is one reason why gerrymandering is viewed as a difficult issue for the courts. Dixon, *One Man, One Vote*, *supra* note 36, at 29–30. "The primary difficulty in forming standards is that the familiar criteria, even including that of equal population, tend to fail at the outset by not recognizing the complexity of the ultimate goal of fair and effective political representation for all significant groups." *Id.* at 30.

43. Issacharoff & Karlan, *supra* note 12, at 551–52 (providing examples of how packing and cracking is used to create gerrymandered districts); *see* Clinton, *supra* note 38, at 3–4 (discussing the various tools used by the gerrymander); Lewyn, *supra* note 35, at 406 (discussing the specific concepts of packing and cracking).

44. *See* BLACK'S LAW DICTIONARY 1140 (8th ed. 2004) (defining packing as "[a] gerrymandering technique in which a dominant political or racial group minimizes minority representation by concentrating the minority into as few districts as possible."). The goal of packing is to "waste" minority votes. SOUTHERN REGIONAL COUNCIL, VOTING RIGHTS GLOSSARY, *at* http://www.southerncouncil.org/helpnet/glossary (last visited Apr. 23, 2005) [hereinafter Voting Rights Glossary].

45. Issacharoff & Karlan, *supra* note 12, at 552.

46. BLACK'S LAW DICTIONARY 395 (8th ed. 2004) (defining cracking as "[a] gerrymandering technique in which a geographically concentrated political or racial group that is large enough to constitute a district's dominant force is broken up by district lines and dispersed throughout two or more districts"). Cracking "diminishes the ability of minority voters to elect representatives of their choice to office by separating the minority population in the redistricting process into two or more districts each with insufficient minority population to constitute an electoral majority." Voting Rights Glossary, *supra* note 44.

to draw boundaries in such a way that the groups opposing the new boundaries are concentrated so as to minimize their representation and influence.[47]

2. History of the Gerrymander

Vieth is not the first time Pennsylvania residents argued over apportionment.[48] During the colonial period, Pennsylvania counties fought over equitable representation, foreshadowing the future problems of apportionment.[49] Even with the colonial disputes, it took another hundred years for the term gerrymander to be coined in the United States.[50] The term combines the word "salamander" with the last name of Vice President Elbridge Gerry, who served under President Madison and was the former Governor of Massachusetts.[51] This term developed in 1812 when Massachusetts redistricted its electoral boundaries, and some thought an illustration of one of the new districts resembled a salamander.[52] Elbridge Gerry, who was then the Governor of Massachusetts, signed the plan into law, forever attaching his name to the term.[53] The term quickly entered into the lexicon of American

47. Issacharoff & Karlan, *supra* note 12, at 551–53; *see* HACKER, *supra* note 36, at 54 (providing an example how gerrymandering worked in the 1962 elections).

48. GRIFFITH, *supra* note 30, at 26.

49. *Id.* In 1701, the Charter of Privileges for colonial Pennsylvania decreed the assemblies should consist of four people from each county and two from the city of Philadelphia. *Id.* The number of representatives from each county increased from four to eight in 1705. *Id.* Eventually, this structure created animosity between the counties of Bucks, Chester, and Philadelphia against the city of Philadelphia. *Id.* at 27. As the population of Philadelphia grew, the counties political supremacy was threatened. *Id.* at 28. Three counties forced the city of Philadelphia to maintain the charter provision until 1771. *Id.* at 27–28. The continuation of the provision prevented equal representation of the city in the assembly based on population. *Id.* at 29. However, Pennsylvania also became the first state to limit the workings of the political gerrymander. *See, e.g.*, *id.* at 43–45 (describing the state constitutional provision that attempted to restrain gerrymandering).

50. *See id.* at 16–17 (providing a detailed account of the creation of the term gerrymander). The term first appeared in a Boston Gazette article entitled "The Gerrymander" on March 26, 1812. *Id.* at 17 n.1. The article described districts recently created by a Massachusetts apportionment act. *Id.* at 16–17. The Massachusetts Democrat-Republican (Jeffersonian) party created the districts in the apportionment act in order to dilute the strength of the Federalist Party. RUSH, *supra* note 35, at 2.

51. GRIFFITH, *supra* note 30, at 17. Governor Gerry contributed to the United States more then just providing the "Gerry" to gerrymander. *Id.* at 19. Governor Gerry was a member of the Continental Congress, signed the Declaration of Independence, was elected to Congress, became Governor of Massachusetts and served as the fifth Vice President of the United States. *Id.* Representative Gerry also made the first motion in Congress to establish the Library of Congress. *Id.*

52. *Id.* at 17. The districts created by the apportionment act formed bizarre shapes that separated single towns from their proper counties. *Id.* One district, specifically the outer district of Essex county, formed what many considered a very unusual shape. *Id.*

53. *Id.*

politics.[54]

Over the last two hundred years, gerrymandering has thrived, and continues to do so today.[55] Recent Congressional elections illustrate the continued success of the gerrymander.[56] The 2004 election of the House of Representatives was the fourth consecutive election in which the incumbent success rate was at least ninety-eight percent.[57] In general, due to gerrymandering, races for seats in the House of Representatives have become less and less competitive over the years.[58]

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54. *Id.* at 19. The Boston Gazette went so far as to declare the term was synonymous with deception. *Id.* "When a man has been swindled out of his rights by a villain, he says he has been gerrymandered." *Id.* (quoting from the Boston Gazette, April 8, 1813). However, the general understanding of the word referred to the creation of districts for partisan advantage based on artificial and arbitrary delineation. *Id.* at 20.

55. *See* Sasha Abramsky, *The Redistricting Wars*, THE NATION, Dec. 11, 2003, at 15 (illustrating how new technology allows sophisticated mapping programs to generate devastatingly accurate district maps designed to pack or crack specific groups); *see also* Cox v. Larios, 124 S. Ct. 2806 (2004) (dealing with a challenge to Georgia's legislative reapportionment plan for the State House of Representatives and Senate). The Supreme Court rendered its decision on June 30, 2004, only a few months after the *Vieth* decision. *Id.* at 2806. The lower court in *Cox* struck down a redistricting plan for the Georgia legislature on grounds that it failed to comply with one-person, one-vote requirements. *Id.* at 2807. The Supreme Court summary affirmed the *Cox* decision. *Id.* at 2806. Justice Stevens wrote, "after our recent decision in [*Vieth*], the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." *Id.* at 2808. *See infra* notes 425–28 (discussing the impact of *Vieth* on the *Cox* decision); *infra* Part II.C.1–4 (discussing the Supreme Court cases involving gerrymandering).

56. Steve Chapman, *Can Arnold Help to Restore True Democracy?* BALT. SUN, Jan. 11, 2005, at 11A. "In 2004, 95 percent of all victors won by more then 10 percentage points, and 83 percent won by more then 20 percent." *Id.* In the 2002 Congressional elections, out of the 435 seats, 356 races were decided by margins of more then twenty percent. Fred Hiatt, *Time to Draw the Line*, WASH. POST, May 3, 2004, at A21. Only four incumbents who faced non-incumbent challengers were defeated. *Id.* Only forty-three House incumbents won reelection "narrowly" defined as winning by less than sixty percent of the vote, while 338 House incumbents enjoyed victory margins of twenty percent or more, including seventy-eight incumbents who ran unopposed by a major party challenger. Daniel R. Ortiz, *Got Theory?* 153 U. PA. L. REV. 459, 477 (2004). More than a third of all State House delegations remained the same after the election. *Id.* In the same election, numerous U.S. Senate elections were extremely competitive. *Id.* at 486. Congressional gerrymandering in California fashioned an election without one competitive race. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003). In California, not a single challenger in the general election received as much as forty percent of the vote. Ortiz, *supra*, at 477.

57. JOHN SAMPLES & PATRICK BASHAM, CATO INSTITUTE, ONCE AGAIN, INCUMBENTS ARE THE BIG WINNERS, *available at* http://www.cato.org/pub_display.php?pub_id=2889 (Apr. 23, 2005) [hereinafter INCUMBENTS].

58. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003) (discussing how "redistricting has helped to transform the U.S. House of Representatives into a body that will no longer accurately reflect majority will"). Historically, redistricting after the census creates more competitive Congressional races in the '02 years. Jacobson, *supra* note 56, at 10. However, only four non-incumbent challengers won in the 2002 U.S. House of Representatives election, which

Only sixteen of the 435 seats in the House of Representatives shifted from one party to the other following the 2004 election.[59] The dispute over gerrymandering has become a battle for political survival, with each new districting plan more wantonly partisan than the last.[60] Some redistricting plans have even moved beyond the traditional gerrymander and taken the form of the so-called "perrymander," named after Governor Rick Perry of Texas.[61] A perrymander occurs when a political party controls both houses of the state legislature and the governor's office and redistricts the state's electoral boundaries without new census data or a judicial order requiring a new plan.[62] Many viewed the Texas plan as the zenith of partisan gerrymandering since it intended to create an additional seven safe Republican seats in the

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was the lowest number of successful challenges in any U.S. general election. *Id.* at 11. The number of races classified as "tossup" or "leaning" prior to the 2002 election amount to only fourty-eight. *Id.* at 10. This is compared to the 1992 election that had 103 tossup races and the 1982 election that had eighty-four tossup races. *Id.*

59. Patrick O'Connor, *Dems Waited for Breeze that Never Came*, THE HILL, Dec. 15, 2004, at 14. The sixteen party changes included two Democrats who switched parties before the election and four Texas Democrats who lost the election mainly due to the redistricting plan implemented in Texas. *Id.*; *see infra* note 62 (discussing the Texas redistricting plan). Outside of Texas, only three incumbents lost reelection in 2004. O'Connor, *supra*, at 14. Nearly a third of the incumbents faced either no challenger or one without campaign funds. INCUMBENTS, *supra* note 57.

60. CONGRESSIONAL QUARTERLY, JIGSAW POLITICS: SHAPING THE HOUSE AFTER THE 1990 CENSUS 3 (1990) [hereinafter JIGSAW POLITICS]. Issacharoff identified the relatively new technique of "shacking" as a method to reduce voter representation. Issacharoff & Karlan, *supra* note 12, at 552. Shacking does not focus on the voter, but on the actual incumbent representative. *Id.* Shacking occurs when redistricting excludes an incumbent's residence from the district of the incumbent's current constituents. *Id.* Shacking can also occur when redistricting places two incumbents, normally from the same party, into one district forcing them to compete against each other. *Id.* at 552–53.

61. John Ratliff, *Texas Republicans Crossed the Line This Time*, WASH. POST, Oct. 19, 2003, at B1. As governor of Texas, Perry helped to promote the Texas redistricting plan challenged in *Session v. Perry*. *Id.*

62. *A New Map: Partisan Gerrymandering as a Federalism Injury*, *supra* note 1, at 1196 (viewing perrymandering as the "ultimate partisan gerrymander"). Traditionally, state legislatures redraw Congressional and other legislative districts after the national Census, which occurs every ten years. JIGSAW POLITICS *supra* note 60, at 3. Recently, the decennial tradition has been broken through the introduction of redistricting plans in Colorado and Texas outside the ten-year period. Abramsky, *supra* note 55. The Texas gerrymander saga involved Democrat state senators fleeing to Okalahoma and New Mexico to prevent a quorum, while the Republicans contacted local federal law enforcement officials to track down the Senators. *Id.* The Colorado Supreme Court struck down that state's gerrymandered plan. *Id.* The Colorado Supreme Court ruled that the state constitution only allowed redistricting to occur once per census, and nullified the new redistricting plan. *Id.*; *see* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1237 (2003) (striking down Colorado General Assembly's attempt to redistrict outside the usual decennial census process); *see generally* Michael A. Carvin, *"A Legislative Task": Why Four Types of Redistricting Challenges are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L. J. 2, 40–50 (2005) (providing an in-depth discussion of the Colorado decision).

closely-divided U.S. House of Representatives, outside the usual decennial process.[63] Regardless, even in the current environment, some have attempted to find new ways to combat gerrymandering.[64] The possible ability of legislatures to rein in the gerrymander lends support to the idea that partisan gerrymandering is a non-justiciable political question, making the role of the courts unnecessary and redundant.[65]

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63. Richard L. Hasen, *Looking For Standards (In All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 627 (2004). Following the 2002 election, Texas Republicans gained unified control of the State's legislature. Linda Greenhouse, *Justices Revive Texas Districting Challenge*, N.Y. TIMES, Oct. 19, 2004, at A4. Under prodding from Republicans House Majority Leader Tom DeLay, the state Republicans redistricted the congressional seats of Texas outside the normal ten-year period. Toobin, *supra* note 7, at 63. Less then two years before, the existing district plan had been implemented following the 2000 census. Greenhouse, *supra*, at 14. Holding successive special legislative sessions, the Republicans over strong objections by the Democrats, passed a new plan shifting more then eight million people into new districts, splitting one Democratic district into five pieces, and pairing six Democratic and Republican incumbents in district redrawn to favor the Republican. *Id.* The map included a district that stretched 340 miles from Rio Grande City near the Mexican border to the State Capitol in Austin. Ratliff, *supra* note 61, at B1; *see* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated by*, 125 S. Ct. 351 (2004) (considering the Texas redistricting plan).

64. Joe Hadfield, *Arnold Takes on the Gerrymander*, CAMPAIGNS & ELECTIONS, Feb. 2005, at 21 (highlighting that states using an independent approach in redistricting created twice as many competitive races then gerrymandered states). In 1981, Iowa created a nonpartisan arm of the legislature that creates the congressional districts for the state. Adam Clymer, *Why Iowa Has So Many Hot Seats*, N.Y. TIMES, Oct. 27, 2002 §4, at 5. The organization uses computer programs to create compact, contiguous districts that disregard partisanship and incumbency. *Id.* However, some criticize the plan since it does not focus on incumbent protection. *Id.* This lack of protection could lead to a senior member of Congress being removed from office, which for a small state like Iowa could reduce its overall influence in Congress. *Id.* Justice Souter's dissent in *Vieth* even attempted to find a new method to combat gerrymandering by incorporating the *McDonnell Douglas* burden-shifting method used in discrimination cases. Vieth v. Jubelirer, 124 S. Ct. 1769, 1817 (2004) (Souter, J., dissenting). The *McDonnell Douglas* test initially was used in Title VII claims alleging racial discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the *McDonnell Douglas* test, the plaintiff is required to establish a prima facie case of discrimination. *Id.* at 802. The plaintiff must show: (1) the plaintiff is a member of a racial minority; (2) the plaintiff applied for and was qualified for an open position; (3) the plaintiff did not receive the position; and (4) after refusing to hire the applicant, the employer kept the position open and continued to seek applicants with similar qualifications to the plaintiff. *Id.* Once the plaintiff established a prima facie case, the burden then shifted to the employer to articulate a legitimate, nondiscriminatory reason why the plaintiff was not hired. *Id.* If the employer articulated a legitimate reason, the plaintiff was allowed to show the proffered reason is pretextual. *Id.* at 804; *see infra* Part III.C.3.b (discussing Justice Souter's new method to combat partisan gerrymandering).

65. *Vieth*, 124 S. Ct. at 1775 (plurality opinion) (finding the "power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant"); *see infra* note 267 (providing a list of the various congressional acts); *see also* Joseph C. Coates, III, *The Court Confronts the Gerrymander*, 15 FLA. ST. U. L. REV. 351, 366–71 (1987); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 679 (2002).

B. The Political Question Doctrine

The political question doctrine normally refers to subjects the courts deem not applicable to judicial consideration.[66] Under the doctrine, the question is whether the advocated constitutional provisions provide rights that the courts can enforce against parties in litigation.[67] Political questions fall within the principle of justiciability.[68] The justiciability requirement places an obligation on parties to litigate an actual "case or controversy."[69] The doctrine is closely connected to the separation of powers principle, in that political questions exclude from judicial review controversies which revolve around determinations constitutionally committed for resolution to Congress, state legislatures,

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66. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 76 (2001). However, the desire to seek protection of a political right does not automatically mean the issue is a political question. 16A AM. JUR. 2D *Constitutional Law* § 265 (2004) [hereinafter *Constitutional Law* § 265]; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 99 (2d ed. 1988) ("An issue is political not because it is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application."). *See generally* 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 (2002) (providing a detailed account of the rise and fall of the political question doctrine).

67. TRIBE, *supra* note 66, at 98.

68. *Id.* (noting political question cases delve into the limits of judicial competency making them part of the justiciability doctrine). "The justiciability of a controversy depends not upon the existence of a federal statue, but upon whether a judicial resolution of that controversy would be consistent with the separation of powers principles embodied in the Constitution, to which all courts must adhere even in the absence of an explicit statutory command." *Constitutional Law*, *supra* note 66, § 265; *see* Poe v. Ullman, 367 U.S. 497 (1961) (plurality opinion).

> Justiciability is of course not a legal concept with a fixed content or susceptible to scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.

Id. at 508–09. *See generally* TRIBE, *supra* note 66, at 67–72 (outlining the doctrine of justiciability).

69. Article III of the United States Constitution limits the judicial power to only "cases and controversies." U.S. CONST. art. III, § 2, cl. 1. This requirement limits federal jurisdiction to issues capable of being resolved by the courts and maintains a separation of powers between the branches of government. *See* Flast v. Cohen, 392 U.S. 83 (1968) (defining the role and jurisdiction of federal courts in a tripartite government).

> In part those words [case and controversy] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Id. at 95.

or the executive branch.[70] The essential quality of a political question is the court's desire to avoid conflict with a co-equal branch of the government in violation of the primary authority of that coordinate branch.[71] The doctrine is a mixture of constitutional interpretation and judicial discretion.[72]

The Supreme Court's development of the political question doctrine dates back to *Marbury v. Madison*.[73] *Marbury* is famous for establishing the authority of the judiciary to review the constitutionality of executive and legislative acts.[74] The *Marbury* Court also sketched the notion of a political question.[75] The Court first applied the political question doctrine in *Luther v. Borden*.[76] There, the Court faced the prospect of determining the legitimate government of Rhode Island and whether the state government violated the Guaranty Clause of the Constitution.[77] The Court concluded that the issue fell outside the

70. *Constitutional Law* § 265, *supra* note 66; *see* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The non-justiciability of a political question is primarily a function of the separation of powers."); TRIBE, *supra* note 66, at 107 (judging the political question doctrine "reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable by-product of the efforts of federal courts to define their own limitations"). *See generally* Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse as a Political Question*, 12 CARDOZO J. INT'L & COMP. L. 109, 140–47 (discussing the history and development of the separation of powers doctrine).

71. *See* United States Dep't. of Commerce v. Montana, 503 U.S. 442, 458 (1992) (invoking the political question doctrine acknowledges the possibility that a constitutional provision may not be judicially enforceable, but that decision is far different from determining that the specific action does not violate the Constitution); 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE DESKBOOK § 15 (2002) ("[P]olitical-question doctrine purports to establish that a particular question is beyond judicial competence no matter who raises it, how immediate the interest it affects, or how burning the controversy. Judicial incompetence to decide is in effect found to be beyond the help or needs of any adversaries.").

72. TRIBE, *supra* note 66, at 107.

73. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). At issue was whether Congress acted unconstitutionally in conferring upon the Court authority to issue original writs of mandamus, which was not included in the Court's original jurisdiction as defined by the Constitution. TRIBE, *supra* note 66, at 23.

74. CHEMERINSKY, *supra* note 66, at 39. The case confirmed the "basic assumption that the Constitution is judicially declarable law." TRIBE, *supra* note 66, at 97.

75. *Marbury*, 5 U.S. at 170 (stating "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court").

76. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

77. *Luther*, 48 U.S. at 34–37. The dispute followed the Dorr Rebellion in which a number of Rhode Island citizens unsuccessfully challenged the charter government to adopt a new and more democratic constitution. *Id.* The specific issue involved the actions of charter government soldiers in ending the rebellion. *Id.* The Guaranty Clause mandates "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.

realm of judicial competence and that Congress, through the power of the Guaranty Clause, had the capacity to make the proper determination.[78] Through the development of the political question doctrine, the Supreme Court established areas that fell within the doctrine; however, the boundaries of these areas have not always been clear.[79] Importantly, claims involving "political issues" have normally fallen outside of the political question doctrine.[80]

The Court delineated the boundaries of the political question doctrine in *Baker v. Carr*.[81] The case involved the apportionment of the Tennessee Assembly.[82] The Assembly had not been reapportioned in

78. *Luther*, 48 U.S. at 41–44.

79. *See* Charles M. Lamb, *Judicial Restraint on the Supreme Court*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 21 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (noting the meaning of a political question can be expanded or contracted to meet the conditions of the time). Political questions "are at least as real as Santa Clauses in department stores before Christmas. We have to know what to do about them even if we believe they ought not to be there." WRIGHT & KANE *supra* note 71, § 15 (quoting Zechariah Chafee, Jr.). *Bush v. Gore*, 531 U.S. 98 (2000) is a recent example of the lack of clarity related to the political question doctrine. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformational Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1229 (2002) (stating the issue of justiciability was never truly raised in *Bush v. Gore*).

80. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (finding no political question related to determining a State's proper method in selecting electors); United States Dep't of Commerce v. Montana, 503 U.S. 422, 458 (1992) (reversing a judgment holding unconstitutional a 1941 statute prescribing method of "equal proportions" as the method to be used for determining the number of representatives to which each State was entitled, and concluding that the issue was "political" only insofar as it "raised an issue of great importance to the political branches"); United States v. Munoz-Flores, 495 U.S. 385 (1990) (holding a dispute under the Origination Clause, which mandates that all bills for raising revenue originate in the House of Representatives, did not present a non-justiciable political question); United States v. Nixon, 418 U.S. 683 (1974) (holding that the intra-executive nature of the dispute between President Nixon and a special prosecutor did not give rise to a political question); Powell v. McCormack, 395 U.S. 486 (1969) (concluding that the political question doctrine did not bar review of the House of Representatives' exercise of the Article I, section 5 power to judge the qualifications of its members). *But see, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (concluding the Constitution's textually demonstrable commitment to the Senate of the conduct of impeachment trials prevented court review of the specific Senate impeachment procedures); Goldwater v. Carter, 444 U.S. 996 (1979) (per curiam) (summarily vacating the decision of a court of appeals holding that the President had the power to terminate a treaty with Taiwan without the approval of the Senate, but dividing over the extent that the political question doctrine controlled in the case); Gilligan v. Morgan, 413 U.S. 1 (1973) (invoking the political question doctrine by finding a lack of standards for the court to determine the validity of training of the Ohio National Guard under the Fourteenth Amendment); Coleman v. Miller, 307 U.S. 433 (1939) (finding no basis in the Constitution to determine the length of time allowed to ratify an amendment to the Constitution); *Luther*, 48 U.S. at 41–44 (holding the Guaranty Clause providing a republican form of government fell within the powers of another branch).

81. Baker v. Carr, 369 U.S. 186 (1962).

82. BUTLER & CAIN, *supra* note 37, at 27. Tennessee city voters brought the suit arguing the gross inequalities in district populations for the state assembly violated the Tennessee constitution and the Fourteenth Amendment. *Id.* at 29. The lack of reapportionment created a 23 to 1

sixty years, despite a state constitutional requirement that representation be based on population, and significant changes in population had occurred since the last reapportionment in 1901.[83] For many years, the Court had maintained that reapportionment was a political question, and the Court had no role in settling disputes.[84] Regardless of the past, the Court in *Baker* determined apportionment was no longer a political question.[85] The Court articulated six factors to determine whether the issue in dispute was a non-justiciable political question.[86] These six factors gave the Court a structure in which to analyze political question issues.[87] Since *Baker*, the Court has continued to apply these factors, rarely finding an issue to be a non-justiciable political question.[88] The *Baker* decision initiated and established the Court's role in

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disparity between the largest and smallest district in the Tennessee House and a 6 to 1 disparity in the Tennessee Senate. *Id.*

83. *Baker*, 369 U.S. at 190–91; *see* RICHARD CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS, 154–55 (1970) (discussing the issues raised by the plaintiffs and defendants in *Baker*); Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, *in* THE SUPREME COURT AND THE CONSTITUTION, 189–90 (Philip B. Kurland ed., 1965) (providing a background to the situation in Tennessee at the time of the case).

84. *See* TRIBE, *supra* note 66, at 98–100 (providing an overview of Supreme Court cases leading to *Baker*); *see also* Wood v. Brown, 287 U.S. 1, 8 (1932) (involving, for the first significant time, the question of apportionment justiciability); *see generally* WRIGHT & KANE, *supra* note 71, at § 15 (describing earlier Supreme Court cases involving the political question doctrine). *Wood* involved the refusal of the Court to invalidate a Mississippi law that had created districts of unequal populations. *Wood*, 287 U.S. at 8. Four Justices asserted that the Court did not have jurisdiction over redistricting. *Id.*

85. *Baker*, 369 U.S. at 210.

86. *Baker*, 369 U.S. at 217. The Court's factors included:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

87. TRIBE, *supra* note 66, at 100–02. Justice Brennan continually underlined the concern that the doctrine focus on separating the proper sphere of federal judicial power from the appropriate spheres of federal executive and legislative power. *Baker*, 369 U.S. at 217.

88. *See* TRIBE, *supra* note 66, at 105 (discussing the use of political question doctrine as a basis to hold an issue as non-justiciable); Barkow, *supra* note 66, at 268–73 (discussing the cases involving political question doctrine following *Baker*); *supra* note 80 (listing a number of Supreme Court cases involving the doctrine). *But see* Gilligan v. Morgan, 413 U.S. 1, 11 (1973) (stating that simply "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise"). *Gilligan* is one of the only cases since *Baker* to invoke the political question doctrine and find the issue non-justiciable. TRIBE, *supra* note 66, at 105.

apportionment disputes.[89]

C. The Reapportionment Revolution

Once the Court entered the political thicket, it wasted no time in making its mark.[90] The Court first developed the "one person, one vote" standard requiring legislatures to create districts with equal populations.[91] Even with the mathematical formula, the Court focused on the qualitative idea of fair and effective representation.[92] As a result, the jurisprudence continued to develop from the Voting Rights Acts of 1965 and a series of racial gerrymandering cases.[93]

1. Entering the Political Thicket

While *Baker* is famous for establishing the factors which determine a political question, the decision also established the Court's role in apportionment controversies.[94] Previously, the Court refused to enter the political thicket of apportionment, most notably in the case of *Colegrove v. Green*.[95] The *Baker* decision changed this direction.[96] In *Baker*, Tennessee voters brought a claim alleging that the failure of the Tennessee Assembly to readjust the electoral districts violated their

89. Dixon, *One Man, One Vote*, *supra* note 36, at 385.

90. *See infra* Part II.C.1 (outlining the apportionment revolution).

91. *See infra* Part II.C.2 (discussing the one person, one vote standard).

92. *See infra* Part II.C.3 (discussing the search for fair and effective representation).

93. *See infra* Part II.C.4 (discussing the racial gerrymandering cases and the related standards).

94. Baker v. Carr, 369 U.S. 186 (1962); TRIBE, *supra* note 66, at 100 n.32 (deeming *Baker* began the series of cases that "effectively restructured most of the nation's legislatures").

95. Colegrove v. Green, 328 U.S. 549, 556 (1946). Justice Frankfurter writing for the Court believed "[c]ourts ought not to enter this political thicket [of legislative apportionment]." *Id.* at 556. In *Colegrove*, Illinois' voters challenged the constitutionality of the state's apportionment of congressional districts. *Id.* at 550. Colegrove was a professor of political science at Northwestern University. BUTLER & CAIN, *supra* note 37, at 26. The professor contested the population variances between the 7th district, where he resided and that included 914,000 citizens, and the neighboring 5th district, which had a population of 112,000. *Id.* The Court asserted the issue beyond the scope of the judicial branch, squarely within the power of Congress and affirmed the lower court by dismissing the suit. *Colegrove*, 328 U.S. at 556. Justice Frankfurter viewed the right asserted as falling under Article IV, Section 4, the Guaranty Clause, which made it a political question. CLAUDE, *supra* note 83, at 150; *see* RUSH, *supra* note 35, at 16–17 (arguing beyond the avoidance of the political thicket, the case dealt with several notions about state power to administer elections, individual voting rights, and the power of a state to form and redefine the boundaries of its districts). The Court used *Colegrove* to dismiss a number of apportionment claims. CLAUDE, *supra* note 83, at 151; *see, e.g.*, South v. Peters, 339 U.S. 276 (1950) (confirming the Court's opinion that electoral issues, this one involving the county unit system of voting in Georgia, to beyond the Court's jurisdiction).

96. *See supra* notes 81–86 and accompanying text (discussing the Supreme Court decision of *Baker v. Carr*, 369 U.S. 186 (1962)).

equal protection rights granted by the Fourteenth Amendment to the United States Constitution.[97] Since an alleged violation of the Equal Protection Clause was the sole basis for the claim, the Court asserted that the political question doctrine should not be invoked without first making an inquiry into the precise facts and posture of the particular case.[98] However, the challenge on Fourteenth Amendment grounds was not a new legal theory, and the Court before *Baker* had continually rejected it.[99] Nevertheless, the *Baker* Court applied the newly developed factors to determine the existence of a political question, and held that the issue of apportionment did not fall within the bounds of a political question.[100] By placing apportionment issues under the Equal Protection Clause, the Court used the Fourteenth Amendment's judicially manageable standards to determine the validity of the claim.[101] The application of the Fourteenth Amendment did not focus

97. *Baker*, 369 U.S. at 187–88. The appellants originally brought a narrow Fourteenth Amendment claim based on the violation of the Tennessee Constitution, but the Court focused on the amicus curiae brief of the Solicitor General, which presented a broader version of the Fourteenth Amendment issue. Neal, *supra* note 83, at 195; *see supra* notes 81–86 and accompanying text (discussing the Supreme Court decision of *Baker v. Carr*, 369 U.S. 186 (1962)).

98. *Baker*, 369 U.S. at 217; *see* CLAUDE, *supra* note 83, at 157.

99. *See* Neal, *supra* note 83, at 191 (providing details to earlier challenges to apportionment under the Fourteenth Amendment); *see, e.g.*, Radford v. Gary, 352 U.S. 991 (1957) (refusing to hear an apportionment challenge from Okalahoma based on political question doctrine); Kidd v. McCanless, 352 U.S. 920 (1956) (refusing to hear an apportionment challenge from Tennessee based on political question doctrine); Anderson v. Jordan, 343 U.S. 912 (1952) (refusing to hear an apportionment challenge from California based on political question doctrine); Cox v. Peters, 342 U.S. 936 (1952) (refusing to hear an apportionment challenge from Georgia based on political question doctrine); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950) (refusing to hear an apportionment challenge from Louisiana based on political question doctrine); South v Peters, 339 U.S. 276 (1950) (refusing to exercise the courts equity powers in cases posing political issues arising from a Georgia's geographical distribution of electoral strength among its political subdivisions); MacDougall v. Green, 335 U.S. 281 (1948) (challenging a statute requiring a petition to form and to nominate candidates for a new political party be signed by at least 25,000 qualified voters, and contain 200 signatures from each of at least 50 counties within the state).

100. *Baker*, 369 U.S. at 226; *see* Neal, *supra* note 83, at 195–201 (providing an overview of the six opinions filed in *Baker*); *supra* note 86 (discussing the six factors to determine a political question). Justice Frankfurter dissented believing the Court's decision was "empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope." *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting). Many commentators had the same worries as Justice Frankfurter. Dixon, *One Man, One Vote*, *supra* note 36, at 32 (observing a "detailed judicial policing of gerrymandering would be a Herculean task bordering on the impossible," but "there can be no total sanctuaries in the political thicket, else unfairness will simply shift from one form to another"); Neal, *supra* note 83, at 188 (observing the decision in *Baker* "start[ed] from a. . .precarious base—a fragmented Court, an abrupt reversal of position, unexplored and debatable substantive principles, and the contemplation of remedies as novel as they are drastic").

101. *Baker*, 369 U.S. at 226 ("Judicial standards under the Equal Protection Clause are well developed and familiar. . . ."). The Fourteenth Amendment states in relevant part that "[n]o state

on harm to the individual voter, but rather on the need for equality of voting strength.[102] The decision in *Baker* began the so-called apportionment revolution, in which redistricting became primarily driven by legal decisions.[103]

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shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law. U.S. CONST. amend. XIV, § 1. The Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) ushered in the modern era of Equal Protection jurisprudence. CHEMERINSKY, *supra* note 66, at 527; *see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding segregation is a deprivation of the Equal Protection of laws guaranteed by the Fourteenth Amendment). The Court has relied on the Equal Protection Clause as a significant provision in the struggle to end invidious discrimination and preserve fundamental rights. CHEMERINSKY, *supra* note 66, at 527. The basic question posed by the Equal Protection Clause is whether the government's classification of a certain group is justified by a sufficiently related purpose. *Id.* The sufficient justification depends on the type of discrimination employed by the government. *Id.* at 528. The Court established three levels of scrutiny depending on the group affected by the discrimination. *Id.* at 529. Discrimination based on race or national origin is subject to strict scrutiny. *Id.* Strict scrutiny requires the government to show a compelling purpose for the discrimination and it is unable to achieve its objective through any less discriminatory alternative. *Id*; *see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (finding strict scrutiny "strict in theory and fatal in fact"). Intermediate scrutiny focuses on discrimination based on gender. CHEMERINSKY, *supra* note 66, at 529. To be upheld, the law must be related to an important government purpose, and the discrimination must have a substantial relationship to the end being sought. *Id.*; *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny for gender classifications). The final level of review is labeled the rational basis test. CHEMERINSKY, *supra* note 66, at 529. All laws not subject to strict or intermediate scrutiny are subject to the rational basis test. *Id.* Under this test, a law will be upheld if it is rationally related to a legitimate government purpose, and the means selected is a rational manner to accomplish the end. *Id.* at 529–30.

102. Neal, *supra* note 83, at 209.

> What is at stake in the reapportionment cases is not. . .an individual concern with equality, the interest of man in being treated like fellow man. In this respect the cases differ from those that have been the traditional concern of the Equal Protection Clause. Denial, or dilution, of the vote of a particular racial group, for example, offends the Fourteenth or Fifteenth Amendment not primarily if at all because it weakens the legislative influence of the voter as an individual or even of all the affected class as a group. Such discrimination harms the individual directly by singling him out for different treatment on grounds that are offensive and that degrade him. No comparable personal injustice or injury can be asserted by a. . . voter who enters the polling booth knowing that his vote will weigh less than that of [another voter].

Id.; *see* CLAUDE, *supra* note 83, at 146 (finding the main concern with apportionment was the wide population differences between the electoral districts). The under-representation this created, especially in urban centers, undermined the credibility of fair and effective representation while allowing legislatures to ignore the needs of these underrepresented voters. *Id.* at 148–49. Distinctions between residents of a state on the basis of geographical location are not insulated from the prohibitions of the Fourteenth Amendment. *Id.* at 147.

103. BUTLER & CAIN, *supra* note 37, at 28 (noting after *Baker* the power to determine the "broad approach to redistricting passed from Congress and the state legislatures to the courts"). *Baker* and its progeny reversed decades of court decisions that held redistricting beyond the court's purview. GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 4 (2002). These decisions did not just change the court's involvement, but sparked a massive wave of redistricting

2. The Principle of One Person, One Vote

Baker opened the floodgates for judicial challenges to the apportionment of state legislatures and federal congressional districts.[104] These decisions led to the "one person, one vote" principle, articulated in *Wesberry v. Sanders*[105] and *Reynolds v. Sims*.[106] This principle, based on the Equal Protection Clause, prohibited dilution of a person's vote through the apportionment process.[107] It required the electoral districts of the state to include the same number of citizens.[108]

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in the 1960s. *Id.* *See generally id.* at 12–28 (discussing the impact on the apportionment revolution on federal and state elections).

104. *See* TRIBE, *supra* note 66, at 1065 n.12 (listing the apportionment cases before the Court in 1964). The Court considered a number of apportionment cases in 1964. *See, e.g.*, Lucas v. Forty-Fourth Colorado General Assembly, 377 U.S. 713 (1964) (finding a violation of one person, one vote standard even with a state wide referendum approving the districting plan); Roman v. Sincock, 377 U.S. 695 (1964) (finding legislative apportionment provisions of the Delaware Constitution violated the equal protection clause of the Fourteenth Amendment); Davis v. Mann, 377 U.S. 678 (1964) (finding Virginia apportionment plan that did not mandate that either of the houses of the Virginia general assembly be apportioned sufficiently on a population basis); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) (applying equal protection to both houses of a bicameral state legislature); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (finding New York violated the Fourteenth Amendment in its apportionment of the state legislative bodies).

105. Wesberry v. Sanders, 376 U.S. 1 (1964). *Wesberry* challenged the gross disparity in the population of Georgia's congressional districts under the Fourteenth Amendment's Equal Protection Clause. *Id.* The districts had not been reapportioned since 1931 and ranged from 272,154 in the northeastern rural 9th district to 823, 860 in the urban 5th district of Atlanta. JIGSAW POLITICS, *supra note* 60, at 23. In a 6–3 decision, the Supreme Court held that congressional districts must be substantially equal in population. *Wesberry*, 376 U.S. at 8. The Court based its decision on Article I, Section 2 of the Constitution. *Id.* Article I, Section 2 states "that representatives shall be apportioned among the states according to their respective numbers and be chosen by the people of the several states." U.S. CONST. art. I, § 2. For the Court, this article meant that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 8; *see* TRIBE, *supra* note 66, at 1063–66 (discussing the establishment of the one person, one vote standard).

106. Reynolds v. Sims, 377 U.S. 533 (1964). *Reynolds* dealt with an Alabama apportionment plan for the state legislature. *Reynolds*, 377 U.S. at 537. Based on Fourteenth Amendment grounds, the Court affirmed that equal number of voters should elect equal numbers of representatives. *Id.* at 560–61. The Court stated "achieving...fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Id.* at 565–66. Even though *Wesberry* or *Reynolds* were not the first to articulate the standard, the cases became the most famous symbols of the standards. TRIBE, *supra* note 66, at 1063–66; *see* Gray v. Sanders, 372 U.S. 368, 379 (1963) (holding for the first time that a unit-vote system in elections for a single office in a single constituency contravened the Equal Protection Clause and equal protection required a one person, one vote standard). Chief Justice Warren called *Reynolds* his most important opinion. Issacharoff & Karlan, *supra* note 12, at 541.

107. BUTLER & CAIN, *supra* note 37, at 28. During the 1964 term, the Court invalidated thirteen state legislative plans for having excessive population deviations. *Id.*; *see* TRIBE, *supra* note 66, at 1068–71 (discussing the mathematical requirements of the one person, one vote standard).

108. TRIBE, *supra* note 66, at 1071.

The Court distinguished between congressional districts and state legislative districts in determining the allowable variations of populations between districts.[109] The establishment of one person, one vote created the foundation for the judicially discoverable and manageable standards used by courts in future cases.[110] The one person, one vote principle dramatically corrected the deviations in congressional districts, and nullified a majority of states' electoral district maps.[111] Congressional reaction was swift, but ultimately failed to alter the one person, one vote standard established by the Court.[112] While the principle seemed to establish quantitative standards for apportionment, the formula did not deal with any of the qualitative issues of fair and effective representation.[113]

3. Fair and Effective Representation

Even before the one person, one vote standard, the Supreme Court recognized that fair and effective representation required more than just equally weighted votes.[114] Groups of voters could not be excluded

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109. *See Reynolds*, 377 U.S. at 577–78 (allowing distinctions between Congressional and state legislative representation). The Court placed a stringent requirement on deviations of populations in congressional districts. JIGSAW POLITICS *supra* note 60, at 24. The Court struck down a redistricting plan that allowed a variation of 3.1 percent between districts. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). The Court held minor deviations were permissible only when the state provided substantial evidence that the variation was unavoidable. *Kirkpatrick*, 394 U.S. at 532. However, the Court declared that there was no "fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the as nearly as equal practicable standard." *Id.* at 530.

110. JIGSAW POLITICS, *supra* note 60, at 25. However, a number of commentators believed the one person, one vote actually increased the opportunity for gerrymandered districts. RUSH, *supra* note 35, at 3.

111. JIGSAW POLITICS *supra* note 60, at 25. After the 1971–72 redistricting period based on the 1970 census, 385 of the 435 congressional districts had less then one percent variance from the state average district population. *Id.* In comparison, after the 1962 election, only nine districts deviated less then one percent from the state average. *Id.*

112. *See* Dixon, *One Man, One Vote*, *supra* note 36, at 385–86 (outlining Congressional response to the Court's apportionment revolution). Over 130 resolutions and bills were introduced in Congress aimed at restoring congressional jurisdiction over redistricting, delaying or staying state compliance with the Court decisions or even proposing constitutional guidelines for redistricting. BUTLER & CAIN, *supra* note 37, at 28. Senator Dirksen of Illinois introduced a constitutional amendment that would have given states the power to apportion one house of the state legislature on a non-population basis. *Id.*

113. TRIBE, *supra* note 66, at 1074. Even though Chief Justice Warren in *Reynolds* stated "achieving. . .fair and effective representation for all citizens is . . . the basic aim of legislative apportionment," *Reynolds*, 377 U.S. at 565–66, the Court did not provide guidance to the lower courts beyond the mathematical requirement. TRIBE, *supra* note 66, at 1074.

114. *See* BUTLER & CAIN, *supra* note 37, at 33 (discussing fair representation goes beyond mathematical equality); Singer, *supra* note 41, at 532 (discussing permissible waivers to the one person, one vote); *see also* Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of Thicket at Last*, *in* 1986 SUP. CT. REV. 175, 178 n.20 (1986) (discussing individual

from influencing the government through tricks in the apportionment process, such as the method used by the defendants in *Gomillion v. Lightfoot*.[115] In *Gomillion*, the Alabama legislature redrew the city boundaries of Tuskegee, effectively eliminating African-American voters from the city.[116] The lower courts upheld the action based on long established precedent of judicial deference to state governments altering political boundaries.[117] The Supreme Court viewed the new boundaries as an illegal method of minimizing the impact of a group of voters' influence because the new boundaries did not conform to the traditional districting principles.[118] The Court based its decision on the Fifteenth rather than the Fourteenth Amendment, thus avoiding the broader issue of equal protection.[119]

Even with the *Gomillion* decision and the creation of the one person, one vote standard a few years later, questions remained as to the proper standard to be used in determining a valid apportionment.[120] For example, in *Wright v. Rockfeller*,[121] minority voters challenged

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Justices views on gerrymandering included in Supreme Court decisions).

115. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

116. *Gomillion*, 364 U.S. at 340. The Court described the new boundaries as "an uncouth twenty-eight-sided figure." *Id.* The creation of the new boundaries was in response to increased African-American voter registration. Gordon E. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, *in* REAPPORTIONMENT IN THE 1970S 131 (Nelson W. Polsby ed., 1971) [hereinafter Baker, *Gerrymandering*]. The new boundaries excluded all but four or five of the four hundred African-American voters, but did not remove any of the white voters from the Tuskegee. *Id.* at 131.

117. *See* Baker, *Gerrymandering*, *supra* note 116, at 131. (discussing earlier cases where courts deferred to the legislature).

118. *Gomillion*, 364 U.S. at 347. The Court viewed the new city boundary has an attempt to single out a racial minority for special discriminatory treatment. *Id.* at 346. Even though reapportionment and the establishment of political boundaries is traditionally a role for legislative branch, the discriminatory nature of the defendants removed the judicial deference. *Id.* at 346–47. The Court wrote "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." *Id.* at 347.

119. Baker, *Gerrymandering*, *supra* note 116, at 131. By avoiding Equal Protection issues, it seemed the majority wanted to avoid undermining the holding of *Colegrove*, but still strike down a clear instance of racial discrimination. *Id.* Justice Frankfurter claimed *Gomillion* was not "an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Gomillion*, 364 U.S. at 341. However, Justice Whittaker argued that the case was better decided under Equal Protection than the Fifteenth Amendment since the right to vote was not denied, but simply the right to vote in Tuskegee. *Id.* at 349 (Whittaker, J., concurring). The Fifteenth Amendment mandates "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1; *see* RUSH, *supra* note 35, at 18–21 (questioning the Court's logic of finding a right to vote violation).

120. TRIBE, *supra* note 66, at 1074; *see* Singer, *supra* note 41, at 533 (discussing the judicial landscape after *Gomillion*).

121. Wright v. Rockfeller, 376 U.S. 52 (1964).

Manhattan's four congressional districts, stating that the districts were racially gerrymandered to segregate minority voters.[122] The Court simply assumed justiciability and proceeded to a resolution on the merits, finding that the plan did not violate the minority voters' constitutional rights.[123] However, *Wright* received little attention at the time because the Court released *Wesberry* on the same day.[124]

To resolve these questions, Congress attempted to assist the Court by passing the Voting Rights Act of 1965.[125] As originally passed, the Voting Rights Act sought to suspend the use of certain tests and devices that historically frustrated African-Americans from exercising their Fifteenth Amendment rights.[126] For example, section 5 of the Act attempted to limit the ability of certain states to establish new obstacles for minorities to achieve fair representation in the redistricting process.[127] Moreover, section 5 specifically related to the issue of racial gerrymandering by placing limits on the states' ability to redistrict without federal government approval.[128]

After the enactment of the Voting Rights Act, the Court refocused on other procedures that might violate constitutional standards.[129] In

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122. *Id.* at 53. The voters based the claims on the Fifteenth and Fourteenth Amendments. *Id.*

123. *Id.*; Clinton, *supra* note 38, at 11 (discussing the *Wright* decision). By affirming the district court's findings on a failure of proof instead of non-justiciability grounds, the Court implicitly accepted racial gerrymandering claims were a violation of the Fourteenth Amendment. *Id.*

124. Clinton, *supra* note 38, at 12; *see supra* note 105 (discussing the Supreme Court decision of *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

125. Voting Rights Act of 1965, 42 USC § 1973 (2000).

126. 42 U.S.C. § 1973. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 30 WASH. & LEE L. REV. 1347, *reprinted in* CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW, 243 (Paul Finkelman ed., 2001). The Act eliminated the use of such tests or devices in states and counties. *Id. See generally* MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE (2001) (reviewing the role of the Department of Justice and specifically, the Civil Rights Division in enforcing the Act).

127. 42 U.S.C. § 1973c. Section 5 applies to the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia and parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 42 USC § 1973.

128. 42 U.S.C. § 1973c (1965). Section 5 requires States to obtain pre-clearance from the Attorney General of the United States or from the United States District Court for the District of Columbia for any change in a "standard, practice or procedure with respect to voting." 42 U.S.C. § 1973c. To obtain pre-clearance, the State must prove that the new redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. *See* J. Gerald Hebert et al., THE REALISTS' GUIDE TO REDISTRICTING, 2000 A.B.A. SEC. ADMINISTRATIVE LAW AND REGULATORY PRACTICE 59–65 (providing an overview of Section 5 and the procedures for pre-clearance).

129. *See* TRIBE, *supra* note 66, at 1077 (discussing Court decisions after passage of the Voting

Whitcomb v. Chavis,[130] the Court evaluated multi-member districts and determined that they were not automatically discriminatory against minorities.[131] Moving beyond the one person, one vote standard, in *White v. Regester*,[132] the Court declared a legislative districting plan unconstitutional, despite the fact that the districts were equally populated.[133] However, the Court remained unclear as to the specific level of proof necessary to show an unconstitutional districting plan.[134] Consequently, a series of lower court challenges and the retirement of some Justices eventually led to the decision of *Mobile v. Bolden*.[135] The *Bolden* Court dismissed a challenge to the Mobile, Alabama at-large election system, which elected the members of the city commission.[136] Despite the fact that African-Americans composed roughly thirty-five percent of the population, no African-American had ever been elected commissioner.[137] The voters argued that they were being denied equal access to the local political system and requested the court institute a single-member district system.[138] In short, the Court

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Rights Acts); *see, e.g.*, Fortson v. Dorsey, 379 U.S. 433, 438 (1965) & Burns v. Richardson, 384 U.S. 73, 88 (1965) (finding multimember districts valid under one person, one vote as long as the district did not "operate to minimize or cancel out the voting strength of racial or political elements of the voting population"). The *Burns* and *Fortson* opinions seemed to suggest that the Fourteenth Amendment provided protection against political discrimination; however, the lower courts did not take the suggestion. *See* Clinton, *supra* note 38, at 17 (discussing lower court decisions avoiding issues of partisan gerrymandering after *Burns* and *Fortson*); *e.g.*, City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (affirming summarily a district court decision that at-large elections for city council held after the expansion of the city's corporate boundaries to include more white areas, thereby giving white voters a majority in the city, diluted black voters and violated the Voting Rights Act of 1965).

130. Whitcomb v. Chavis, 403 U.S. 124 (1971).

131. *Id.* (asserting multi-member state legislative districts were not per se unconstitutional). *Whitcomb* dealt with a challenge by black voters against the design on the multi-member legislative district around Indianapolis, Indiana. *Id.* at 128–29; *see* Clinton, *supra* note 38, at 19 (arguing the Court and many commentators failed to comprehend the gerrymander aspect of the case and instead treated it as another challenge to multimember districts).

132. White v. Regester, 412 U.S. 755 (1972).

133. *Id.* at 763–74 (striking down a multi-member district plan on Fourteenth Amendment grounds). The Court determined that the multi-member districts complied with the one person, one vote requirement. *Id.* However, the history of discrimination related to the multi-member districts, which provided less opportunity for minorities to participate in the electoral process, made the district unconstitutional. *Id.* at 767–79.

134. TRIBE, *supra* note 66, at 1078 (discussing the impact of the *Whitcomb* and *White* decisions on developing levels proof required in apportionment cases).

135. Mobile v. Bolden, 446 U.S. 55 (1980). Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, *in* THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 25 (Lorn S. Foster ed., 1985) [hereinafter Engstrom, *Racial Vote Dilution*].

136. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27.

137. *Id.*

138. *Id.* at 26.

ruled in favor of the current at-large system because the voters failed to show intentional discrimination.[139]

Importantly, the *Bolden* Court shifted the burden of proof to the challengers of the alleged discriminatory behavior and required them to show both discriminatory effect and intent.[140] In response, Congress amended section 2 of the Voting Rights Act and restored the burden of proof standard used by many lower courts prior to *Bolden*.[141] Furthermore, Congress amended the Voting Rights Act to prohibit election laws that unintentionally minimized minority voters' influence.[142] Before the amendment, section 2 was a general statutory prohibition against any racially based interference with the right to vote.[143] The newly amended section prohibited minority vote dilution and allowed a showing of discriminatory effect to be sufficient to prove

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139. *Id.* at 29.

140. TRIBE, *supra* note 66, at 1078–79. The Court had recently altered its approach to the Fourteenth Amendment's Equal Protection Clause. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27. The Court in *Washington v. Davis*, 426 U.S. 229 (1976), held discriminatory treatment alone does not establish a sufficient presumption of unconstitutionality to require that such treatment be scrutinized strictly by the judiciary. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 27. The Court determined disproportionate impact can be cited as evidence supporting an inference of a discriminatory intent, but that alone is not a sufficient condition for such an inference. *Davis*, 426 U.S. at 242. In relation to apportionment cases, the Supreme Court cited *Wright v. Rockefeller*, 376 U.S. 52, 84 (1964) as supporting this new standard, but did not reference *Whitcomb* or *White* in which findings concerning racial motivation were never expressed. *Davis*, 426 U.S. at 24 (1976). In *Wright*, the Court dismissed the claim for a failure to show that the legislature was motivated by racial considerations. *Wright*, 376 U.S. at 84. The plurality opinion in *Bolden* explicitly held that the *Davis* intent standard applied to vote dilution cases. *Bolden*, 446 U.S. at 67 (finding the intent requirement clearly "applied to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination").

141. Lewyn, *supra* note 35, at 412 n.64 (1993). The congressional intent in adopting the revision to section 2 was explicit. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 35. It was "to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*." SENATE COMMITTEE ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, pt. 6, at 16 (1982). In fact, the *Whitcomb-White* participation standard was codified by the following addition to Section 2:

> A violation is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election. . .are not equally open. . .in that [blacks] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)). *See generally* Hebert, *supra* note 128, at 14–20 (providing an overview of Section 2).

142. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. at 134.

143. Engstrom, *Racial Vote Dilution*, *supra* note 135, at 34. It read "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race and color." Voting Rights Act of 1965, Pub. L. No. 89-110 § 2, 79 Stat. 437, as enacted, 42 U.S.C. § 1973.

discrimination in redistricting.[144]

Following this amendment, the Court established a legal standard for adjudicating section 2 claims in *Thornberg v. Gingles*.[145] The chief question facing the Court in *Gingles* was whether the provisions contained in section 2 of the Voting Rights Act made multi-member districts *per se* discriminatory against African-American voters.[146] While not finding multi-member districts automatically in violation of section 2, the Court established a three-prong test to determine if a specific multi-member district violated section 2.[147] The three-prong test required a showing that: (1) the minority group was "sufficiently large and geographically compact" to constitute a majority in a differently drawn single member district; (2) the minority group was a "politically cohesive" group; and (3) the white majority voted together, which enabled it, in the absence of special circumstances, to usually defeat the minority's preferred candidate.[148] The test in *Gingles* was later expanded to single-member districts.[149] The decision affirmed Congressional desire to overturn *Bolden* and eliminated intent as a criterion for showing section 2 violations.[150] It also created a change in how state legislatures viewed racial gerrymandering.[151] The

144. TRIBE, *supra* note 66, at 1078. The amended section 2 reads:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. at 134 (amending 42 U.S.C. § 1973 (1965)) (emphasis added).

145. Thornburg v. Gingles, 478 U.S. 30 (1986); Hebert, *supra* note 128, at 14–20 (discussing the aftermath of *Gingles* and the effect of the three prong test on section 2 litigation); Marsha J. Tyson Darling, *Volume Introduction* to CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW xi, xvii (Paul Finkelman, ed., 2001). The Court decided *Gingles* and *Bandemer* on the same day. Issacharoff & Karlan, *supra* note 12, at 550.

146. *Gingles*, 478 U.S. at 48–49 (examining the creation of six multi-member districts in North Carolina).

147. *Id.* at 48 (finding multi-member districts "generally will not impeded the ability of minority voters to elect representatives of their choice"); *see* SCHER ET AL., *supra* note 37, at 76–85 (discussing the three prong test and effects *Gingles* had on section 2 litigation).

148. *Gingles*, 478 U.S. at 50–51.

149. *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (holding that it would be illogical to require a challenger of a multi-member district to a higher standard of proof then a challenger to a single-member district).

150. SCHER ET AL., *supra* note 37, at 79. Regardless of the legislature's goal, *Gingles* dictates that if the district boundaries dilutes the voting strength of minorities then it constituted a violation of section 2 as well as the Fourteenth and Fifteenth Amendments. MARK MONMONIER, BUSHMANDERS & BULLWINKLES, 25 (2001); *see supra* notes 135–38 and accompanying text (discussing the Supreme Court decision of *Mobile v. Bolden*, 446 U.S. 55 (1980)).

151. *See* MONMONIER, *supra* note 150, at 25 (viewing *Gingles* as requiring legislatures to

amendment to section 2 appeared to require states to create districts that would enhance the voting power of racial minorities.[152]

4. Benign Racial Gerrymandering

In the aftermath of *Gingles* and following the 1990 census, state legislatures began to use racial gerrymandering to benefit racial minorities.[153] The Supreme Court first tackled this issue in *Shaw v. Reno*.[154] In *Shaw*, a group of white voters in North Carolina brought suit against the U.S. Attorney General, who pre-cleared the state's redistricting plan that included two minority-majority districts.[155] The white voters alleged that the district boundaries created an unconstitutional racial gerrymander.[156] The Court focused on the bizarre shape of the district and determined that the shape of the district had no other purpose than to link voters on the basis of race.[157] The *Shaw* Court restricted the use of affirmative racial gerrymandering aimed at increasing the power of racial minorities.[158] However, while the Court refused to find redistricting based on race as a *per se* violation, the state's plan did subject it to strict scrutiny,[159] and the

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create minority-majority districts if the three-prong test is satisfied since failure would allow the federal judiciary to create such districts); *see also* Marsha J. Tyson Darling, *Volume Introduction* to CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW xi, xvii–xviii (Paul Finkelman, ed., 2001) (determining that *Gingles* was "in large part responsible for intensifying the pressure toward creating minority single-member voting districts, because it provided specific criteria to be considered in the creation of a minority legislative district").

152. Hebert, *supra* note 128, at 14–20; Engstrom, *Racial Vote Dilution*, *supra* note 135, at 35.

153. Redistricting Task Force, *supra* note 40. After the census, the Justice Department refused to approve initial redistricting plans because alternative proposals existed that provided additional minority districts. *Id.* In response, many state legislatures attempted to maximize the number of minority districts. *Id.*

154. Shaw v. Reno, 509 U.S. 630 (1993)

155. *Shaw*, 509 U.S. at 630. The Attorney General approved the districting plan as required by section 5 of the Voting Rights Act. SCHER, *supra* note 37, at 85; *see supra* note 125–26 and accompanying text (discussing section 5 of the Voting Rights Act). The Twelfth district cut diagonally across the state, following Interstate 85 and at times was no wider then the right of way. SCHER ET AL., *supra* note 37, at 93.

156. *Shaw*, 509 U.S. at 633–34.

157. *Id.* at 644–47 (finding "appearances do matter"). The Court stated that a regular shape is not constitutionally required. Hebert et al., *supra* note 128, at 52.

158. *Shaw*, 509 U.S. at 657. Concerned racial gerrymandering may "balkanize" voters into competing racial factions Justice O'Connor, writing for the Court, deemed race-based districting, even if created for remedial purposes, subject to strict scrutiny. *Id.* Justice O'Connor worried that districts based on race would have a socially divisive impact on votes resembling "political apartheid." *Id.* at 647. According to the majority, racially motivated districts send the wrong message to elected officials suggesting their primary obligation is to represent only the members of the racially-dominated group rather than the whole constituency. *Id.* at 648.

159. *Id.* at 642 ("This Court never has held that race-conscious state decisionmaking is

Court remanded the case to the district court.[160]

After *Shaw*, the Court continued to refine the judicial standards in adjudicating racial gerrymandering disputes.[161] The Court in *Miller v. Johnson* reaffirmed that race may be a criterion in congressional districting, but only under conditions of strict scrutiny.[162] *Miller* involved a challenge to a Georgia congressional redistricting plan that created two minority-majority districts.[163] The Court established that the bizarre appearance of an electoral district is not a necessary condition for a constitutional violation.[164] *Miller* required a showing

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impermissible in all circumstances.") The Supreme Court held that racial classifications will be allowed only if the government can meet the heavy burden of demonstrating that the discrimination is necessary to achieve a compelling government purpose. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). Under strict scrutiny, the government must show an important reason for its action and must demonstrate that the goal cannot be achieved through any less discriminatory means. *Wygant*, 476 U.S. at 280 n.6; *see* CHEMERINSKY, *supra* note 66, at 668. However, the Court had previously held that districts created to enhance minority representation were valid even though the state "deliberately used race in a purposeful manner" to create minority-majority districts. United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 165 (1977) [hereinafter referred to as "*UJO*"]. The majority in *Shaw* attempted to circumvent the holding in *UJO*. *Shaw*, 509 U.S. at 651. Justice O'Connor distinguished *UJO* by claiming *Shaw* did not involve a vote dilution claim. *Id.* The Court faced a balance between the idea that no state shall purposefully discriminate against any individual on the basis or race and members of a minority group should be free from discrimination in the electoral process. DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 78 (1999); *see supra* notes 101 & 159 (discussing the levels of scrutiny applied by courts based on the government's classification of groups).

160. *Shaw*, 509 U.S. at 658. The Supreme Court actually revisited the *Shaw* case three more times before it was ultimately resolved. *See* Easley v. Cromartie, 532 U.S. 234 (2001) (reversing a district court decision that found the redistricting plan invalid because the district court viewed the plan as predominately based on racial consideration); Hunt v. Cromartie, 526 U.S. 541 (1999) (reversing a district court decision that granted legislature's motion for summary judgment against a change to a new redistricting plan created after *Shaw*); Shaw v. Hunt, 517 U.S. 899 (1996) (reversing a district court decision that found the redistricting plan valid after being remained by the Court in *Shaw v. Reno*, 509 U.S. 630).

161. *See* United States v. Hayes, 515 U.S. 737 (1995) (holding that a plaintiff challenging the constitutionality of a redistricting plan must have proper standing). The Court determined the "special representational harms can cause racial classifications in the voting context" only fall on the voter in the specific district being challenged. *Id.* at 745. A person in another district "does not suffer these special harms." *Id.*

162. Miller v. Johnson, 515 U.S. 900 (1995).

163. *Id.* at 913. The issue was whether the district was the result of race-based districting, which could be demonstrated through shapes, demographics and other evidence. *Id.*

164. *Id.* at 917. So long as a district is not drawn for impermissible reasons, a district may take any shape, even a bizarre one. *See* Bush v. Vera, 517 U.S. 952, 999 (Kennedy, J., concurring) (finding it not necessary for districts to pass "beauty contest in order to be constitutionally valid); *see also* Brooke Erin Moore, *Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts too Much Power in an Historically Political Arena*, 33 U. BALT. L. REV. 123 (2003) (providing an overview of the *Vera* decision). However, it seems that shape still plays an important role since the only two districts to survive a *Shaw* challenge were relatively compact. Hebert et al., *supra* note 128, at 53; *e.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567, 575 (1997) (finding Florida's Senate District 21 as "demonstrably

that race was the predominant factor in the creation of the electoral district.[165] If this burden is met, courts will apply strict scrutiny to determine if the state had a compelling governmental interest in creating the specific district and whether the district was narrowly tailored to achieve that interest.[166] The Court's recent decisions demonstrate that the determination of whether race predominated as the motivation in the creation of districts will require fact intensive analysis focusing on traditional districting principles.[167]

D. Applying the Lessons Learned to Partisan Gerrymandering

Even though the Court established standards of review for racial gerrymandering, the Court remained silent as to the issue of political

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benign and satisfactorily tidy"); DeWitt v. Wilson, 856 F. Supp. 1409, 1413–15 (E.D. Cal. 1994) (three-judge court), *summarily aff'd in relevant part*, 515 U.S. 1170 (1995) (finding the California districting plan incorporated "[n]o bizarre boundaries").

165. *Miller*, 515 U.S. at 916. The Court determined the burden required was a

> show[ing], either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominate factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including, but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district had been gerrymandered on racial lines.

Id. (internal quotations omitted).

166. Redistricting Task Force, *supra* note 40. Compliance with section 5 is not a judicially significant reason for creating minority-majority districts. CANON, *supra* note 159, at 80; *e.g.*, Abrams v. Johnson, 521 U.S. 74 (1997) (upholding the dismantling of two black majority districts in Georgia even though the legislature had shown a clear preference for keeping one of those two districts during the redistricting process); *Vera*, 517 U.S. at 972 (holding that protecting incumbents was a not a strong enough reason for the redistricting plan when race was viewed as the predominate factor); *see also supra* Part II.C.2 (discussing the search for fair and effective representation); *supra* note 150 and accompanying text (discussing the levels of scrutiny applied by courts based on the government's classification of groups).

167. Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, *in* FAIR AND EFFECTIVE REPRESENTATION? 19 (Mark E. Rush & Richard L. Engstrom ed., 2001) [hereinafter Engstrom, *Political Thicket*]. The four traditional districting principles identified in *Shaw & Miller* include contiguity, compactness, respect for political subdivisions, and recognition of communities of interest. *Id.* Courts also rely on certain types of evidence such as district shape and demographics, statements made by legislators and their staff, and the nature of the data used in the districting process. Hebert et al., *supra* note 128, at 51. These principles will serve as "a crucial frame of reference" in evaluating districts. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *cf.* Engstrom, *Political Thicket*, *supra* at 20–30 (discussing the ambiguity of using traditional districting principles as constitutional principles to determine illegal gerrymandering); CANON, *supra* note 159, at 79 (arguing the Court's new analysis under Equal Protection that emphasizes traditional districting principles will cause greater confusion then the one person, one vote or voter dilution standards).

gerrymandering.[168] At first, the Court avoided trying to distinguish between districts created with politics in mind and districts created solely for partisan political gain.[169] Going forward, the Court began to talk about the possibility of dealing with partisan gerrymanders, but continued to invoke the one person, one vote standard to strike down redistricting plans viewed as violating fair and effective representation.[170]

1. The First Attempt

The first Supreme Court case directly dealing with partisan gerrymandering was *Gaffney v. Cummings*.[171] The challenge involved a 1972 Connecticut reapportionment plan for the state legislature.[172] A bipartisan apportionment board created the plan designed to insure that each party's strength in the legislature was roughly proportional to its statewide voting strength.[173] The Court upheld the plan and noted that political considerations were always part of a redistricting plan.[174] The Court held that a redistricting plan that included political factors was not automatically unconstitutional.[175] However, the Court did hint that plans, which unduly discriminated against political groups, might be unconstitutional.[176]

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168. TRIBE, *supra* note 66, at 1080. The Court did make a distinction for bipartisan gerrymandering plans designed to protect incumbents; *see, e.g.*, Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) (holding that drawing lines to minimize contests between sitting incumbents did not in and of itself establish "invidiousness").

169. *See infra* Part II.D.1 (discussing the Court's first attempt to deal with partisan gerrymandering).

170. *See infra* Part II.D.2 (discussing the Court's second attempt to deal with partisan gerrymandering).

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

172. *Id.* at 752. The plan developed by an apparently bipartisan commission had "the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Id.*

173. *Id.* The districting plan deliberately ignored traditional districting principles, sometimes totally disregarding political boundary lines. Alfange, *supra* note 114, at 205. The plan focused on the preservation of incumbents and necessitated a political judgment as to the effect a particular district would have on the political welfare of the political parties. *Gaffney*, 412 U.S. at 752; Alfange, *supra* note 114, at 205.

174. *Gaffney*, 412 U.S. at 752–54; *see* Carl A. Auerbach, *The Supreme Court and Reapportionment*, *in* REAPPORTIONMENT IN THE 1970S 74, 77 (Nelson W. Polsby, ed., 1971) ("Direct representation of group or interest is undesirable in a democracy. The values sought by such representation are inconsistent with those promoted by geographic districting.").

175. *Gaffney*, 412 U.S. at 752–54; Alfange, *supra* note 114, at 205.

176. *Gaffney*, 412 U.S. at 754. The Court recalled earlier decisions that held districts might be vulnerable to the Fourteenth Amendment if racial or political groups had been "fenced out of the political process" and their voting strength diluted. *Id.* However, the Court refused to attempt the "impossible task of extirpating politics from what are the essentially political processes of the

2. Second Time Around

The 1980 census provided the next opportunity for the Court to weigh in on partisan gerrymandering.[177] The incumbent Republican members of Congress from New Jersey challenged the newly adopted Congressional redistricting plan as a violation of Article I, section 2 of the United States Constitution in *Karcher v. Daggett*.[178] The New Jersey plan included a variation of 0.69 percent between the most populated and the least populated district.[179] The majority of the Court affirmed the lower court decision that invalidated the plan under the *Reynolds'* standard of one person, one vote because the variations were avoidable.[180] The Court did not specifically decide the issue on qualitative ideas of fair and effective representation, but the Justices expanded fair and effective representation beyond the quantitative aspect of numerical equality.[181] Every opinion written in *Karcher* addressed the issue of partisan gerrymandering.[182] The four dissenters went so far as to find that partisan gerrymandering might impose a greater threat to Equal Protection than electoral districts of unequal population.[183] Justice Stevens argued that vote dilution included

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sovereign states." *Id.* The Court conceded that the focus on precise mathematical equality to the exclusion of all other considerations opened the way for the denial of fair and effective representation by other means. *Id.* at 749. However, the Court implicitly noted that political gerrymandering was beyond the control of the courts, and that, while the court should avoid the adopting constitutional standards that would encourage it, they could do little to prevent it. *Id.* at 754; Alfange, *supra* note 114, at 205.

177. Singer, *supra* note 41, at 535; *see* TRIBE, *supra* note 66, at 1070, 1074 (discussing the Supreme Court cases arising from the 1980 census).

178. Karcher v. Daggett, 462 U.S. 725 (1983). Based on the 1980 census, New Jersey lost one seat in the U.S. House of Representatives. *Id.* at 727. Article I, section 2 states "that representatives shall be apportioned among the states according to their respective numbers and be chosen by the people of the several states. U.S. CONST, Art. I, § 2.

179. *Karcher*, 462 U.S. at 728. The plan included 14 districts with an average population of 526,059. *Id.* The largest district had a population of 527,472 while the smallest had a population of 523,798. *Id.* at 727. This created a deviation of 0.6984%. *Id.* The New Jersey legislature had considered a plan with a deviation of 0.4514%. *Id.* at 729.

180. *Id.* at 738. The Court held the difference between the districts "could have been avoided or significantly reduced with a good-faith effort to achieve population equality." *Id.*; *see* JIGSAW POLITICS: *supra* note 60, at 26 (discussing the Court decision in *Karcher*).

181. *Karcher*, 462 U.S. at 765 (Stevens, J., concurring); *see id.* at 781 (White, J., dissenting) (suggesting an overemphasis on numerical formulas may distort the "fair and effective representation of all citizens"); *Id.* at 787–88 (Powell, J., dissenting) (acknowledging that gerrymandering presents a threat to the legislative process that may not be remedied by adherence to quantitative figures).

182. Alfange, *supra* note 114, at 210 (reviewing the opinions of the Justices in *Karcher*).

183. *Karcher*, 462 U.S. at 765–84 (White, J., dissenting).

> Although nether a rule of absolute equality or nor one of substantial equality can alone prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographical and political boundaries. . . . Legislatures

partisan gerrymandering and therefore violated the Equal Protection Clause.[184] He argued that simply complying with the one person, one vote standard did not automatically create a constitutionally valid redistricting plan.[185] Justice Stevens reaffirmed the imperative of population equality, but believed it should be supplemented with additional criteria.[186] The *Karcher* decision shifted the Court's focus onto the qualitative issue of partisan gerrymandering.[187]

E. Partisan Gerrymandering in Davis v. Bandemer

The decision in *Davis v. Bandemer* suggested the coming of a second reapportionment revolution.[188] *Bandemer* established a formal judicial role in partisan gerrymandering disputes.[189] However, the Justices failed to provide a clear standard to the lower courts when dealing with these issues.[190]

1. Justiciability Declared

The Court squarely focused and arranged the discussion around the issue of unconstitutional politically gerrymandered districts in *Davis v.*

> intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect.

Id. at 776 (White, J., dissenting) (internal quotations omitted). Justice Powell's separate dissent went further by stating redistricting plans that were predominately based on political considerations might be unconstitutional. *Id.* at 787–88 (Powell, J., dissenting).

184. *Id.* at 744 (Stevens, J., concurring). However, due to a deficient record, Justice Stevens refused to conclude with certainty that the plan was an unconstitutional partisan gerrymandering. *Id.* at 765 (Stevens, J., concurring).

185. *Id.* at 749 (Stevens, J., concurring).

186. *Id.* at 751 (Stevens, J., concurring).

> In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia or irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.

Id. (Stevens, J., concurring).

187. *See* Singer, *supra* note 41, at 537 (discussing the inability to explain *Karcher* on simple quantitative terms).

188. Davis v. Bandemer, 478 U.S. 109 (1986); RUSH, *supra* note 35, at 3 ("The decision constituted a significant change in the Court's behavior, opening new avenues of adjudication and case law."); *see supra*, Part II.C.1 (discussing the first reapportionment revolution ignited by *Baker*).

189. *See infra* Part E.1 (discussing the Court's decions in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

190. BUTLER & CAIN, *supra* note 37, at 35 (discussing the various interpretations of the standards established in *Bandemer*).

Bandemer.[191] In that case, Indiana Democrats challenged a reapportionment plan passed by the Republican-dominated legislature.[192] The district court found the reapportionment plan to be unconstitutional because it deprived the state's Democrats of their rightful share of voting power.[193] The lower court used Justice Stevens's concurrence in *Karcher* as the basis for its opinion.[194] However, the lower court never discussed the justiciability of partisan gerrymanders.[195]

While the parties in *Bandemer* did not originally raise the issue of justiciability, the Supreme Court raised the issue in the appeal and determined the justiciability of political gerrymandering claims.[196] Once the Court determined that none of the identifying factors under *Baker* existed in *Bandemer*, a six-Justice majority promptly pronounced that claims of partisan gerrymandering were justiciable.[197] In addition

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191. *Bandemer*, 478 U.S. 109.

192. *Id.* at 115 (plurality opinion). Following the 1980 federal census, the Indiana General Assembly, as required by state law, began the process of reapportioning the State's legislative districts. *Id.* at 113. The final plan passed in both Republican controlled Houses along party lines and was signed by the Republican Governor. *Id.* at 114 n.2. The complaint contended the district boundaries and the mix of single-member and multi-member districts in the approved plan constituted a partisan gerrymander intended to disadvantage Democrats. *Id.* at 115; *see* Alfange, *supra* note 114, at 231–35 (providing a sketch of the 1981 Indiana reapportionment process).

193. Bandemer v. Davis, 603 F. Supp. 1479, 1491 (S.D. Ind. 1984) (affirming the right of fair and effective representation).

> A scheme designed to insure a predestined outcome does not accord to a vote cast that equality in elective power to which it is guaranteed under the Fourteenth Amendment. Each citizen has a right not only to cast a ballot, but to have his political decision be as meaningful as any other vote. Thus political gerrymandering is a violation of the Equal Protection Clause because it invidiously discriminates against a cognizable, identifiable group of voters.

Id. at 1492.

194. *Id.* at 1490; *see supra* notes 181–82 and accompanying text (discussing Justice Stevens's concurring opinion in *Karcher*).

195. *Bandemer*, 478 U.S. at 118.

196. *Id.* at 118–27. The defendants were the first to raise the issue on appeal. *Id.* at 118.

197. *Id.* at 127. The six Justice majority for justiciability included Justices White, Brennan, Marshall, Blackmun, Powell and Stevens. *Id.* at 113, 161 (plurality opinion). The majority opinion, written by Justice White, based their conclusion of justiciability on *Gaffney* and "repeated reference in other opinions" that found plans that dilute the vote of political groups to be constitutional suspect. *Id.* at 119–20; *see* Part II.D.1 (discussing *Gaffney*). Justice White's opinion reviewed the factors established in *Baker* to the facts in the instant case and found none of them applied. *Bandemer*, 478 U.S. at 122; *see supra* note 86 (discussing the factors of *Baker v. Carr*). Justice White noted *Baker* did not immediately establish a clear judicially manageable standard for apportionment cases. *Bandemer*. 478 U.S. at 123. However, subsequent Supreme Court cases, specifically *Reynolds v. Sims*, 377 U.S. 533 (1964), did clarify such standards. *Bandemer*, 478 U.S. at 123. Justice White concluded the inability to instantaneously perceive an "arithmetic presumption" like the "one person, one vote" standard did not oblige the Court to determine partisan gerrymandering claims non-justiciable. *Id.*; *see* Alfange, *supra* note 114, at

to *Baker*, the Court found earlier Supreme Court decisions involving apportionment provided support for determining whether partisan gerrymandering claims were justiciable.[198] The remaining three Justices argued that the Equal Protection Clause did not supply a judicially manageable standard for resolving purely political gerrymandering claims.[199] The Justices in the minority argued that resolving partisan gerrymandering disputes would require the Court to impose proportional representation.[200] Regardless of the justiciability issue, seven Justices still found the Indiana plan constitutional, but used different rationales.[201]

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237 (highlighting the fact that the Court had "hesitated to take the step for nearly a quarter of a century after *Baker* and that half of the members of the majority had expressed an unwillingness to take it scarcely more then two years earlier").

198. *Bandemer*, 478 U.S. at 123–25. Justice White analyzed the justiciability of racial gerrymander cases such as *White v. Regester*, 412 U.S. 755 (1972), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), to demonstrate the justiciability of political gerrymandering cases. *Bandemer*, 478 U.S. at 124–25. In terms of justiciability, Justice White did not see a distinction between racial and partisan gerrymandering claims. *Id.* at 125. Justice White reaffirmed the idea of fair and effective representation established in *Reynolds*. *Id.* at 123–25; *see* Alfange, *supra* note 114, at 237 (asserting at its base, the one person, one vote rule is an anti-gerrymandering rule).

199. *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring). Justice O'Connor joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion finding partisan gerrymandering covered by the political question doctrine. *Id.* Justice O'Connor viewed apportionment as a straightforward political issue and, therefore, challenges to apportionment plans represented a political question "in the truest sense of the term." *Id.* at 145. Finding partisan gerrymandering as justiciable could only lead to "political instability and judicial malaise." *Id.* at 147. Justice O'Connor viewed partisan gerrymandering as a "self-limiting enterprise" that could be limited by the voters or the political parties. *Id.* at 152; *see* Alfange, *supra* note 114, at 238–43 (discussing Justice O'Connor's concurring opinion regarding the claim of justiciability).

200. *Bandemer*, 478 U.S. at 156–57 (O'Connor, J., concurring). Justice O'Connor feared the Equal Protection clause would require legislative districts to be drawn in a manner that would approximate equivalence under a vote-to-seat ratio. *Id.* at 156–57. This would require each party having the same percentage of seats in the legislature as the percentage of votes it receives in the legislative election statewide. *Id* at 156–57. The majority denied a preference for proportionality *per se*, but simply a preference for parity between votes and representation sufficient to insure fair and effective representation. *Id.* at 126 n.9; *see* Patrick Mulvaney, *Not Quite an Exact Portrait*, THE NATION, Oct. 28, 2004 *available at* http://www.thenation.com/doc.mhtml?i=20041115&c=1&s=mulvaney (discussing proportional representation).

201. *Bandemer*, 478 U.S. 109. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion supporting the reversal of the district court based on the political question doctrine. *Id.* at 144 (O'Connor J., concurring). The six Justices who found partisan gerrymandering a justiciable question split as to the outcome of the case. *Id.* at 113 (plurality opinion). Justice Powell and Justice Stevens urged affirming the district court finding that the redistricting plan was unconstitutional. *Id.* at 161–85 (Powell, J., concurring in part and dissenting in part). Justices White, Brennan, Marshall, and Blackmun viewed the plan as constitutional. *Id.* at 127 (plurality opinion). Even though those four Justices disagreed as to the reasoning, they joined Chief Justice Burger and Justices O'Connor and Rehnquist to form a majority for dismissal. *Id.* at 113; *see* Lewyn, *supra* note 35, at 407 (discussing the Justices' rational in *Bandemer*).

2. The Standards of *Bandemer*

Even though a majority determined the claim in *Bandemer* justiciable, the Court failed to agree on a majority standard for courts to apply when deciding political gerrymandering claims.[202] A plurality of four Justices argued for a standard that required plaintiffs to prove intentional discrimination against a political group as well as a discriminatory effect on that group.[203] Justice White, writing for the plurality, did not consider the showing of the intent prong a difficult one because districting involves political considerations.[204] However, the effects prong required a showing that the group had been repeatedly denied the opportunity to affect the political process.[205] This requirement went beyond showing that the results of an election were not proportional to the relative strength of the parties.[206] In order to show an unconstitutional gerrymander, a group of like-minded voters would need to show an inability to convert their majority numbers into an electoral victory over a number of election cycles.[207] The plurality required a showing of discriminatory effect even if the group had established discriminatory intent.[208]

In his dissent, Justice Powell took a different approach than Justice White in establishing standards.[209] Justice Powell agreed with the plurality that discriminatory intent and effect must be shown, but

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202. Singer, *supra* note 41, at 541. The six Justices in the majority for justiciability split into two camps in deciding the appropriate standard. *Id.* Justices White, Brennan, Marshall, and Blackmun argued for one standard while Justices Powell and Stevens argued for another standard. *Id.*

203. Alfange, *supra* note 114, at 243–44.

204. *Bandemer*, 478 U.S. at 129 (plurality opinion) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."). However, the plurality did not believe it necessary for the majority party to ignore political considerations when developing district boundaries. *Id.* at 129–30.

205. *Id.* at 132–33. (stating that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a groups [sic.] of voters' influence on the political process as a whole" and that "[a] finding of unconstitutionality must be supported by evidence of continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair change to influence the political process").

206. *Id.* at 132–33. The question for the Court was whether the members of the group whose candidates were defeated retain the opportunity to exert effective influence in the state's political process. *Id.* at 133–34; *see also* Alfange, *supra* note 114, at 245 (discussing the plurality view of election results).

207. Alfange, *supra* note 114, at 247.

208. *Bandemer*, 478 U.S. at 134 n.14 (plurality opinion) (holding the requirement of a discriminatory effect is based on the particular characteristics of partisan gerrymandering).

209. *Bandemer*, 478 U.S. at 161–85 (Powell, J., concurring in part and dissenting in part).

disagreed as to how a plaintiff could show it.[210] Justice Powell suggested a multi-faceted approach that reviewed a number of factors.[211] However, even with a *prima facie* case established, Justice Powell contended a plan would still be valid if the state had a rational basis based on permissible neutral criteria.[212]

3. The Aftermath of *Bandemer*

Lacking a majority standard to follow, the lower courts utilized Justice White's plurality opinion.[213] One of the first applications of the *Bandemer* standard occurred in *Badham v. Eu*.[214] California Republicans unsuccessfully challenged the 1982 Congressional reapportionment plan for the state as a violation of the Fourteenth Amendment's Equal Protection Clause.[215] Many viewed the redistricting plan as one of the most egregious gerrymandered plans of the decade.[216] The district court construed *Bandemer* to hold that even if plaintiffs proved a history of disproportionate results, they were also required to prove a strong indication of lack of political power and the

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210. *Id.* at 185 (supporting a need for a "heavy burden of proof" to exist).

211. *Id.* at 173. Justice Powell adopted Justice Stevens's concurrence in *Karcher* as a foundation to determine unconstitutional partisan gerrymandering). *Id. See* TRIBE, *supra* note 66, at 1082 (reviewing Justice Powell's opinion and describing the factors to be used in order to determine partisan gerrymandering). The factors Powell identified are: the shapes of voting districts, adherence to established subdivision boundaries, the nature of the legislative proceedings that resulted in the adoption of the apportionment law, legislative hisotry, and available statistics showing population disparities or vote dilution. *Id. But see* Alfange, *supra* note 114, at 252 (asserting Justice Powell provided no guidance for the lower courts to distinguish between an unconstitutional gerrymander and a plan that gives the majority party an advantage at the polls).

212. *Bandemer*, 478 U.S. at 185 (Powell, J., concurring in part and dissenting in part).

213. Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (applying Justice White's plurality opinion because it "provides the narrowest grounds" for decision); *see* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (stating that when a divided Court decides a case and no single rationale explaining the result obtains a majority of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (plurality opinion of Stewart, Powell and Stevens, JJ.).

214. *Badham*, 694 F. Supp. 664. The Court found the claim to be justiciable under *Bandemer* even though *Bandemer* dealt with state legislative redistricting and this case dealt with congressional redistricting. *Id.* at 668. The Court did not find the distinction to be valid based on *Baker* and *Bandemer*. *Id.*

215. *Id.*

216. Lewyn, *supra* note 35, at 439. The plan placed three sets of Republicans incumbents against each other and divided one Republican district into six different parts. *Id.* Before the implementation of the plan, the Democrats had a one seat lead in the California congressional delegation, but after five congressional elections held under the plan, the Democrat's won sixty percent of all congressional elections even though they had won just over fifty-two percent of the statewide two party congressional vote. *Id.*

denial of fair representation.[217] The test required the plaintiffs to show that they were effectively shut out of the entire political process.[218] In addition to Equal Protection, the Republicans raised a First Amendment claim related to the right of free association.[219] The district court rejected the allegation based on *Bandemer*, explaining that the Republicans were not completely shut out of the political process.[220] Other courts resolving partisan gerrymandering claims quickly adapted the *Badham* view.[221]

The Republicans subsequently attempted to move away from *Badham's* strict interpretation of *Bandemer* and challenged an alleged Democratic gerrymander of the Texas congressional delegation in *Terrazas v. Slagle*.[222] The Texas district court in *Terrazas* asserted that the focus of the effects prong should be on the structures of the state's political system.[223] The court held that a valid challenge to partisan gerrymandering will be satisfied when evidence is presented that shows one political group is perpetuating its power through gerrymandering and the wronged political group is unable to defeat this scheme through its influence in another relevant political structure.[224] The court upheld

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217. *Badham*, 694 F. Supp. at 670.

218. *Id.* at 672.

219. *Id.* at 675. The Republicans asserted the plan penalized Republican voters solely based on their party affiliations, political beliefs, and associations and through limiting the public debate on issues of public importance. *Id.*

220. *Id.* ("an individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. . .") (quoting *Bandemer*, 478 U.S. at 132). The *Badham* court found the Republicans did not allege Democratic representative entirely ignored the interests of Republican voters. *Id.*

221. *See, e.g.*, Pope v. Blue, 809 F. Supp. 392, 397–99 (W.D.N.C 1992) (rejecting North Carolina Republicans challenge to a Congressional redistricting plan where they could not allege that the redistricting plan caused them to be "shut out of the political process."), *aff'd mem.*, 506 U.S. 801 (1992); Republican Party of Va. v. Wilder , 774 F. Supp. 400, 405–06 (W.D. Va. 1991) (rejecting Virginia Republicans claim of partisan gerrymandering in Congressional redistricting which resulted in the pairing of Republican incumbents into the same district, for failing to show that the redistricting would consistently degrade Republican voters influence in the political process as a whole). The district court held that evidence of an anticipated history of disproportionate results did not satisfy the *Bandemer* standard. *Pope*, 809 F. Supp. at 397. The court noted that a number of safe Republican seats were created by the plan, Republicans were not precluded from influencing Democratic legislators and the Republicans First Amendment rights were not violated. *Id.* at 397–99; *see also* Lewyn, *supra* note 35, at 439–43 (discussing some of the district court decisions following *Bandemer*).

222. Terrazas v. Slagle, 821 F. Supp. 1162, 1173 (W.D. Tex. 1993) (rejecting the interpretation of discriminatory effect under Bandemer to require a showing that the voters are wholly ignored by the elected representatives).

223. *Id.* at 1174 ("The term political process as a whole means straightforwardly all the structures of the state governmental system.").

224. *Id.*

the plan, finding that the Republicans still had political influence in other branches of the government.[225] Like *Badham*, the court rejected the asserted First Amendment issues.[226]

In fact, only in *Republican Party of North Carolina v. Martin* did a court find a constitutional violation using the *Bandemer* standards.[227] North Carolina Republicans were back in court this time challenging the state's method of electing trial court judges.[228] Judicial candidates were nominated in local party primaries held in each district and then successful primary candidates from each district ran against each other in a general statewide election.[229] The Republicans argued that the at-large plan diluted Republican votes since judicial candidates had won only one election since 1900, even though they won forty-three percent of the vote in 1986 and forty-six percent in 1984 of the statewide vote in contested races.[230] The Fourth Circuit found the plan to be an unconstitutional partisan gerrymander.[231] The Fourth Circuit deemed that the Republicans had shown a valid history of disproportionate results and that the selection process reduced the likelihood that

225. *Id.* Specifically, the *Terrazas* court cited the ability of Republicans to elect candidates for the statewide position of Governor and Lieutenant Governor as well as holding forty percent of the state assembly. *Id.* at 1174–75.

226. *Id.* at 1174 ("Gerrymandering is concerned with dilution of political influence through the manipulation of elective district boundaries, not with other abuses of the electoral process or First Amendment violations."). *But cf.* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("[an] individual's freedom to speak and to petition the Government for the redress of grievances could not be vigorously protected unless a correlative freedom to engage in group effort for those ends were not also guaranteed."); NAACP v. Alabama ex rel. Patterson, 357, U.S. 449, 460 (1958) ("freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); CHEMERINSKY, *supra* note 66, at 1180 (noting that the Supreme Court has expressly held that freedom of association is a fundamental right protected by the First Amendment).

227. Republican Party of N.C. v. Martin, 980 F. 2d 943 (4th Cir. 1992). However, that "victory" was short lived—in the elections for superior court judges, conducted just five days after the district court concluded the trial finding an unconstitutional gerrymander, every Republican candidates standing for the office of superior court judge was victorious at the state level. Vieth v. Juberlirer, 124 S. Ct. 1769, 1782 n. 8 (2004) (plurality opinion). The Fourth Circuit remanded the case for reconsideration due to the success of the Republicans even under the alleged unconstitutional gerrymandered plan. *Id.*; *see* Republican Party of N.C. v. Hunt, No. 94-2410, 1996 U.S. App. LEXIS 2029, at *2 (4th Cir. Feb. 12, 1996) (remanding the case to the district court for reconsideration).

228. *Martin*, 980 F. 2d at 951.

229. *Id.* at 947.

230. *Id.*

231. *Id.* at 957. The Fourth Circuit found the case justiciable even thought it dealt with the election of trial court judges and not legislative representatives. *Id.* However, a difference existed as to the adjudication of the claim on its merits since it did not involve a legislative districting plan. *Id.* at 952.

Republicans would run, because the chance of success was almost nonexistent.[232] The *Martin* court discussed the First Amendment claim, but found it lacked merit.[233] Even though the court seemed to apply the *Bandemer* standards and to move out of the shadows of *Badham*, the circuit court emphasized that the holding was dependent on the specific facts of the case.[234] The inability of the lower courts to eliminate partisan gerrymandering created a desire for the Supreme Court to provide new guidance in the *Vieth* decision.[235]

III. DISCUSSION

Eighteen years after *Bandemer*, the Supreme Court, in *Vieth v. Jubelirer*, faced the issue of partisan gerrymandering and again attempted to provide proper judicial standards.[236] Part III.A will provide an outline of the facts related to the case.[237] Part III.B will discuss the lower court decisions.[238] Part III.C will review the Supreme Court opinions authored in *Vieth*.[239]

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232. *Id.* The *Martin* court found the electoral system which in effect created the a statewide candidate for a local office representing a possible unconstitutional gerrymandering. *Id.* at 958. The *Martin* court found persuasive the near century long inability for a Republican to be elected superior court judge and the likely probability that the situation would remain. *Id.* However, the *Martin* court held that even a "modicum of electoral success or access to the political process" might have defeated the Republican's ability to establish a *prima facie* case. *Id.* This modicum of success was achieved in the elections conducted after the decision when every Republican candidate standing for office of superior court judge was victorious at the state level. Vieth v. Juberlirer, 124 S. Ct. 1769, 1782 n.8 (2004) (plurality opinion).

233. *Martin*, 980 F. 2d at 958. (finding the Republicans confused the protection offered by the First and Fourteenth Amendments and attempted to extend First Amendment guarantees). The *Martin* court asserted the First Amendment only protected the right to cast an effective vote by prohibiting restriction on ballot access or limit the opportunity for voters to unite in support of a candidate. *Id.* at 960. The election plan did not include direct impediments prohibited by the First Amendment. *See* Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983) (discussing limitations of First Amendment protections in the context of voting, noting certain non-discriminatory impediments are generally allowed). According to the court in *Martin*, Republican political goals are frustrated in the election of superior court judges, however, the First Amendment only guarantees a right to participate in the political process, not a guarantee of political success. *Martin*, 980 F. 2d at 958.

234. *Martin*, 980 F. 2d at 958. Regardless of it emphasis on the specific facts, *Martin* viewed partisan gerrymandering that created grossly disproportionate results and made it difficult to attract candidates or contributors as unconstitutional. Lewyn, *supra* note 35, at 442. In addition, *Martin* rejected *Badham* and *Pope's* suggestion that minority party success in statewide elections unrelated to gerrymandered districts may preclude a gerrymandering claim. *Id.*

235. *See* J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47 (2003) (discussing the motives of the Supreme Court in hearing the case).

236. Vieth v. Jubilirer, 124 S. Ct. 1769 (2004) (plurality opinion).

237. *See infra* Part III.A (discussing the facts of *Vieth*).

238. *See infra* Part III.B (discussing the lower court decisions).

239. *See infra* Part III.C (discussing the Supreme Court opinions). The majority of the Court

A. Facts

After the 2000 census, Pennsylvania's General Assembly initiated the process to redraw the state's Congressional districts.[240] At the time of the redistricting process, the Republican Party held a majority of seats in both state Houses as well as the Governor's office.[241] Under pressure from members of the national Republican Party, the General Assembly adopted a partisan redistricting plan.[242] On January 3, 2002, the General Assembly passed a redistricting plan and a few days later the Governor signed the plan into law.[243]

Shortly thereafter, Democrat Pennsylvania voters sought to enjoin the state from implementing the redistricting plan.[244] According to the complaint, the partisan plan violated a number of constitutional principles including Article I, Section 2 of the Constitution, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and

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dismissed the plaintiffs' claims, but was unable to reach consensus as to the reason behind the dismissal. *Vieth*, 124 S. Ct. at 1773. Justice Kennedy served as the fifth vote to dismiss the claim, but did not agree with all of the plurality's reasoning. *Vieth*, 124 S. Ct. at 1792 (Kennedy, J., concurring). Despite the dismissal, a majority of five Justices affirmed partisan gerrymandering claims as justiciable. *Id.* at 1799 (Stevens, J., dissenting). The remaining Justices argued the Court lacked judicially manageable standards to decide partisan gerrymandering claims making these claims non-justiciable. *Id.* at 1773 (plurality opinion). However, the five Justice who believed partisan gerrymandering justiciable fractured into four separate opinions in regards to the proper standards. *See infra* Part III.C.3.a–c (discussing the dissenting opinions).

240. *Vieth*, 124 S. Ct. at 1773. The population figures based on the 2000 census indicated that Pennsylvania was entitled to 19 Representatives in Congress. *Id.* This represented a reduction of two seats from the previous delegation. *Id.*

241. *Id.*

242. *Id.* The national party desired to adopt a partisan plan as a punitive measure in response to pro-Democrat redistricting plans developed in other states. *Id.* Republican leaders, Tom DeLay, House Majority Leader, and Dennis Hastert, Speaker of the House, urged Pennsylvania legislators to redistrict in order to maintain a Republican majority in the House. Toobin, *supra* note 7, at 63.

243. *Vieth*, 124 S. Ct. at 1773. Originally, the State House of Representatives and the State Senate passed different versions of a redistricting plan. Vieth v. Pa., 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002). A Conference Committee was formed in order to reach a compromise between the two bills. *Id.* During the deliberations of the Conference Committee, their Republican counterparts ignored the views of Democratic members. *Id.* The bill passed the Conference Committee, but all Democratic members of the committee voted against it. *Id.* The redistricting bill was designated as Act 1. *Id.*

244. *Vieth*, 124 S. Ct. at 1773. The plaintiffs were registered Democrats and Pennsylvania citizens. *Vieth*, 188 F. Supp. 2d at 535. Plaintiff Richard and Norma Jean Vieth resided in Lebanon County, which was incorporated in District 16 under Act 1. *Id.* Plaintiff Susan Furey resided in an area of Montgomery County that formed part of a new District 6 under Act 1. *Id.* The defendants included the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting and implementing the redistricting plan. *Vieth*, 124 S. Ct. at 1773. The plaintiff filed the suit in the United States District Court for the Middle District of Pennsylvania. *Vieth*, 188 F. Supp. 2d at 537.

Immunities Clause of the Fourteenth Amendment, and the plaintiffs' right to free association protected by the First Amendment.[245] Specifically, the voters alleged the plan created malapportioned districts in violation of the one person, one vote standard.[246] The allegations also contended that the plan constituted an illegal political gerrymander.[247]

B. The District Court Decisions

A three-judge panel was convened pursuant to 28 U.S.C. § 2284.[248] The defendants filed a motion to dismiss the complaint, which the district court partially granted.[249] The district court granted the motion with respect to the political gerrymandering claim and all claims against the Commonwealth.[250] However, the district court proceeded to trial

245. *Vieth*, 188 F. Supp. 2d at 537.

246. *Vieth*, 124 S. Ct. at 1773. According to the 2000 census, Pennsylvania had a population of 12,281,054. *Vieth*, 188 F. Supp. 2d at 535. If divided equally between the nineteen congressional districts, the population per district would have been 646,371 or 646,372. *Id.* Under Act 1, District 7 included 646,380 while Districts 1, 2 and 17 each had a population of 646,361 creating a nineteen person deviation between the districts. *Id.*

247. *Vieth*, 124 S. Ct. at 1773. Allegedly, the districts were created solely on the basis of partisan advantage and paid no attention to traditional districting principles. *Id.* Under Act 1, eighty-four local governments (counties, cities, boroughs or townships) were split among different congressional districts. *Vieth*, 188 F. Supp. 2d at 535. The plan split Montgomery County, where Plaintiff Furey resided, into six different congressional districts. *Id.* Under the redistricting plan controlling before Act 1, only twenty-seven local governments were divided into different congressional districts. *Id.* at 535–36. The plaintiffs alleged the new electoral districts were designed to shut Democrats out of the political process and caused plaintiffs harm, because congressional members who do not represent their views would represent them. *Id.* at 536.

248. *Vieth*, 124 S. Ct. at 1774. A three-judge panel is required when a suit is filed challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any statewide legislative body. 28 U.S.C. § 2284 (2000). Chief Judge Edward Becker of the Third Circuit Court of Appeals appointed the Honorable Richard Nygaard, United States Circuit Judge for the Third Circuit Court of Appeals, the Honorable William H. Yohn Jr., United States District Judge for the Eastern District of Pennsylvania and the Honorable Sylvia Rambo, Senior United States District Judge for the Middle District of Pennsylvania. *Vieth*, 188 F. Supp. 2d at 536.

249. *Vieth*, 188 F. Supp. 2d at 532.

250. *Vieth*, 124 S. Ct. at 1774. Regarding the Fourteenth Amendment violation, the District Court held the plaintiffs failed to demonstrate an actual discriminatory effect as required by *Bandemer*. *Vieth*, 188 F. Supp. 2d at 547. Following *Bandemer*, The court determined the plaintiffs had not been shut out of the political process. *Id.* Without much discussion, the Privileges and Immunities claim was found irrelevant to the stated cause of action. *Id.* at 548 (noting that the Privileges and Immunities Clause protects against discrimination on the basis of state citizenship and no allegation was made that the plaintiffs were citizens of another State or newly arrived citizens of Pennsylvania). The District Court found the First Amendment violation to be "coextensive" with the equal protection claim. *Id.* Since the court determined the plaintiffs failed to state a claim in regards to equal protection, the court dismissed the First Amendment claim on the same grounds. *Id.* The District Court dismissed the claims against the Commonwealth on Eleventh Amendment grounds. *Id.* at 538–39 (noting the Eleventh

with the apportionment claim.[251] In a 2–1 decision, the district court found for the plaintiffs.[252] The court required the legislature to develop a new redistricting plan in line with the one person, one vote standard.[253] The General Assembly duly passed another plan, which satisfied the court's conditions.[254] The plaintiff attempted to enjoin this plan on similar grounds as the first plan.[255] The court found that the electoral districts were not malapportioned and, citing the court's earlier ruling, rejected the political gerrymandering claims.[256]

Subsequently, the plaintiffs appealed against the dismissal of the political gerrymandering claims to the United States Supreme Court.[257] The Court noted probable jurisdiction on June 27, 2003.[258] On April 28, 2004, the Court decided whether the plaintiffs alleged a valid complaint of partisan gerrymandering and if manageable standards existed to adjudicate the complaint.[259]

C. The Supreme Court Decision

In a 5–4 decision, the United States Supreme Court affirmed the

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Amendment generally prohibits federal courts from hearing suits by private parties against States and their agencies).

251. *See Vieth*, 188 F. Supp. 2d at 541–43 (discussing the plaintiffs success in showing a prima facie case of a violation of the one person, one vote standard as required by Article I, section 2 of the United States Constitution); *supra* Part II.C.2 (discussing the one person, one vote standard).

252. Vieth v. Pennsylvania., 195 F. Supp. 2d 672 (M.D. Pa. 2002). The District Court held the defendants did not employ a good faith effort to draw districts of equal population. *Id.* Furthermore, the defendants failed to show the deviation was necessary to achieve a legitimate goal. *Id.* at 677–78. Judge Yohn, dissenting from the opinion, found that the defendants had provided sufficient justification for the deviation based on the desire to avoid splitting additional voter precinct districts. *Id.* at 679 (Yohn, J., dissenting).

253. *Vieth*, 195 F. Supp. 2d at 678–79.

254. Vieth v. Pa., 241 F. Supp. 2d 478 (M.D. Pa. 2002). On April 17, 2002, the General Assembly passed a revised congressional redistricting plan signed by the Governor the following day. *Id.* at 480. The new redistricting bill was designated Act 34. *Id.*; *see* Issacharoff & Karlan, *supra* note 12, at 555 (outling some of the clearly partisan gerrymandering techinques in the plan).

255. *Vieth*, 124 S. Ct. at 1774.

256. *Vieth*, 241 F. Supp. 2d at 478. The court found Act 34 to be a zero-deviation plan. *Id.* at 481. In addition, the court viewed Act 34 to be similar to Act 1 and stood on its earlier ruling that the plan did not effectively shut the plaintiffs out of the political process foreclosing the partisan gerrymandering claims. *Id.* at 484–85.

257. *Vieth*, 124 S. Ct. at 1774. A direct appeal to the Supreme Court is allowed if a three-judge panel adjudicates the matter. *See* 28 U.S.C. § 1253 (2000) (allowing a direct appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court panel of three judges).

258. Vieth v. Jubelirer, 539 U.S. 957 (2003).

259. *Vieth*, 124 S. Ct. 1769 (plurality opinion).

district court's decision dismissing the partisan gerrymandering claim.[260] Writing for the Court, Justice Scalia determined the claim represented a political question and that the Supreme Court lacked the ability to decide the matter.[261] Justice Kennedy's concurring opinion agreed with the plurality as to the judgment, but disagreed that all partisan gerrymandering claims fall within the political question doctrine.[262] In three dissenting opinions, four Justices argued partisan gerrymandering was a justiciable issue and proposed possible standards to evaluate the claims.[263]

1. The Plurality Opinion

The plurality opinion asserted that partisan gerrymandering claims represent a non-justiciable political question lacking judicially manageable standards.[264] After a review of the relevant facts, the discussion began with a history of partisan gerrymandering in the United States tracing back to the colonial period and the Constitutional Convention.[265] Viewing Article I, Section 4 as providing a remedy for partisan gerrymandering, the plurality contended that Congressional power to restrain the gerrymander had not been idle.[266] The lack of idleness was highlighted by the fact that Congress and the states have introduced a number of bills designed to curb partisan gerrymandering.[267]

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260. *Id.* (plurality opinion).

261. *Id.* at 1778 (plurality opinion); *see infra* Part III.C.1 (discussing the plurality opinion).

262. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring); *see infra* Part III.C.2 (discussing Justice Kennedy's concurring opinion).

263. *Vieth*, 124 S. Ct. at 1810 (Stevens, J., dissenting); *id.* at 1817 (Souter, J., dissenting, joined by Ginsburg, J.,); *id.* at 1825 (Breyer, J., dissenting); *see infra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion); *infra* Part III.C.3.b (discussing Justice Souter's dissenting opinion; *infra* Part III.C.3.c (discussing Justice Breyer's dissenting opinion).

264. *Vieth*, 124 S. Ct. at 1773 (plurality opinion).

265. *Id.* at 1774 (plurality opinion) ("The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing.").

266. *Id.* at 1775 (plurality opinion). Article I, section 4 reads "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST. art. I, § 4. The plurality outlined the various requirements under the different Apportionment Acts passed by Congress. *Vieth*, 124 S. Ct. at 1775–76. At different times these Acts included a contiguous territory requirement in an attempt to defeat partisan gerrymanders. *Id.* However, today the only Congressional requirement is for single member districts. *Id.* at 1776 (plurality opinion) (citing 2 U.S.C. § 2c); *see also* BUTLER & CAIN, *supra* note 37, at 24–26 (discussing some of the provision passed by Congress related to apportionment).

267. *Vieth*, 124 S. Ct. at 1776 (plurality opinion) (identifying several bills introduced in Congress and state legislatures designed to curb gerrymandering); *see* Center for Voting And Democracy, *Redistricting Legislation in the U.S. Congress*, Jan. 2004 *at*

The plurality next turned to the origin of the political question doctrine.[268] After reviewing the six *Baker* factors used to determine whether a political question existed, the plurality applied them and reasoned that no judicially discernible and manageable standards existed for adjudicating political gerrymandering claims.[269] *Bandemer*, which established claims of partisan gerrymandering to be justiciable, had not established a majority standard for the lower courts to follow.[270] Further, the plurality noted that only one lower court since *Bandemer* found sufficient grounds to establish unconstitutional partisan gerrymandering.[271] The plurality argued that *Bandemer* and the eighteen years worth of lower court decisions since *Bandemer* had failed to establish a proper standard.[272]

In an attempt to show that a workable standard does not exist, the plurality reviewed the standards put forth by *Bandemer*, the appellants, and the other Justices.[273] The plurality concentrated first on Justice White's plurality opinion in *Bandemer*, which required a showing of intentional discrimination as well as discriminatory effect on the plaintiffs in order to show unconstitutional political gerrymandering.[274] After sketching the standard announced by Justice White, the plurality presented lower court decisions as well as the analyses of academic commentators showing the standard to be unmanageable.[275] The plurality quickly dismissed Justice White's standard as unworkable and declined to affirm it as constitutionally sufficient.[276] The plurality also discarded Justice Powell's opinion in *Bandemer* as not establishing a

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http://www.fairvote.org/redistricting/congress.htm (discussing the various bills introduced related to eliminating gerrymandering) (last visited Apr. 19, 2005).

268. *Vieth*, 124 S. Ct. at 1776 (plurality opinion).

269. *Id.* at 1776 (plurality opinion).

270. *Id.* at 1777 (plurality opinion); *see supra* Part II.E (discussing the Supreme Court decision of *Davis v. Bandemer*, 478 U.S. 109 (1986)).

271. *Vieth*, 124 S. Ct. at 1777 (plurality opinion).

272. *Id.* at 1777 (plurality opinion). "Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists." *Id.* at 1778 (plurality opinion).

273. *Id.* at 1778–92 (plurality opinion).

274. *Id* at 1778–80 (plurality opinion). "We begin our review of possible standards with that propsed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for the decision in that case, Justice White's plurality opinion has been the standard used by lower courts." *Id.* at 1778 (plurality opinion); *see supra* notes 204–05 and accompanying text (discussing Justice White's plurality opinion in *Bandemer*).

275. *Vieth*, 124 S. Ct. at 1779–80 (plurality opinion) (noting "the legacy of the plurality's test is one long record of puzzlement and consternation").

276. *Id.* at 1780 (plurality opinion). In fact, neither the appellants nor any Justice argued to maintain the standard. *Id.* (plurality opinion).

manageable standard.[277]

The plurality next reviewed the appellants' proposed standard.[278] The appellants had preserved Justice White's intent-plus-effect requirement, but modified the evidence required to achieve the standard.[279] The appellants urged the Court to look at the mapmakers' predominant intent in creating the district boundaries and the effect of the redistricting plan on the ability of a group of voters to achieve a majority of seats if they received a majority of the votes.[280] Even with the modification, the plurality was not convinced that the standard was manageable.[281]

Moreover, the plurality rejected the appellants' attempt to employ racial gerrymandering standards as a basis for partisan gerrymandering standards.[282] Justice Scalia did not regard political affiliation as an immutable characteristic.[283] Due to the constant shift in political views and connections, the plurality failed to see how a majority party and the effects of political gerrymandering could be determined.[284]

In addition, the plurality considered the standards proposed by the dissenting Justices.[285] As initial evidence of lacking standards, the plurality noted that the four dissenters developed three different standards, which were different from the two in *Bandemer* and the one

277. *Id.* at 1784 (plurality opinion). The plurality considered Justice Powell's standard a "totality of the circumstances analysis" to determine "fairness." *Id.* (plurality opinion). The measurement of fairness also did not seem to be a judicially manageable standard for the plurality. *Id.* (plurality opinion).

278. *Id.* at 1780–84 (plurality opinion).

279. *Id.* at 1780 (plurality opinion).

280. *Id.* (plurality opinion). Predominant intent could be shown "by evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." *Id.* (plurality opinion) (quoting Brief for Appellants at 19). Regarding the effects prong, the appellants proposed to replace Justice White's effect test and show effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of circumstances confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." *Id.* at 1781 (plurality opinion) (quoting Brief for Appellants at 20) (citations omitted).

281. *Id.* at 1780–84 (plurality opinion).

282. *Id.* at 1780 (plurality opinion). The plurality viewed redistricting based on race as being unlawful. *Id.* at 1781 (plurality opinion). However, the plurality viewed partisan gerrymandering as a "lawful and common practice." *Id.* (plurality opinion). Justice Scalia believed utilizing racial standards in political gerrymandering cases would allow disgruntled voters to almost always allege partisan advantage was the predominant motivation. *Id.* (plurality opinion).

283. *Id.* at 1782 (plurality opinion) (stating that "[a] person's politics is rarely as readily discernible—and [*never*] as permanently discernible—as a person's race") (emphasis in original)).

284. *Id.* (plurality opinion).

285. *Id.* at 1784–92 (plurality opinion).

proposed by the appellants.[286] The plurality reviewed each proposal and found each one lacked manageable standards for the lower court.[287]

Even though Justice Kennedy concurred in the judgment, the plurality still reviewed his opinion.[288] The plurality asserted that Justice Kennedy's disposition in the case was not legally available.[289] The plurality urged the lower courts to view Justice Kennedy's vote as supporting a finding that partisan gerrymandering falls within the political question doctrine.[290]

In conclusion, the plurality held that no constitutional provision provided a judicially enforceable limit on the political considerations that the states and Congress may use when redistricting.[291] The plurality advocated overruling *Bandemer* and finding partisan gerrymandering claims non-justiciable political questions.[292]

2. The Concurring Opinion

The concurring opinion, authored by Justice Kennedy, urged courts to avoid finding the use of political reasons in creating electoral districts completely unlawful.[293] For Justice Kennedy, a finding of unlawful

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286. *Id.* at 1784 (plurality opinion).

287. *Id.* at 1785 (plurality opinion). The plurality dismissed Justice Stevens's opinion by noting the standards to determine lawful racial gerrymandering and partisan gerrymandering are very different. *Id.* ("A purpose to discriminate on the basis of race receives the strictest scrutiny under the *Equal Protection Clause*, while a similar purpose to discriminate on the basis of politics does not."); *see* Bush v. Vera, 517 U.S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny.") (emphasis in original). According to the plurality, Justice Souter's "fresh start" test seems to provide a manageable standard, but in fact created too many "how" questions for the courts to answer. *Vieth*, 124 S. Ct. at 1787 (plurality opinion) ("[N]o element of his test looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff group. We do not know the precise constitutional deprivation his test is designed to identify and prevent."). Without much discussion, the plurality dismissed Justice Breyer's standard as extremely vague. *Id.* at 1788–89 ("[W]e neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.").

288. *Vieth*, 124 S. Ct. at 1790–92 (plurality opinion).

289. *Id.* at 1790 (plurality opinion). The plurality maintained that the Court had two options in affirming the lower court's decision. *Id.* at 1792 (plurality opinion). The Court could have affirmed because political districting presents a non-justiciable question or because the correct standard, which identifies unconstitutional political districting, had not been met in this case. *Id.* According to the plurality, the Court could not affirm because of the inability to develop a manageable standard. *Id.* (plurality opinion).

290. *Id.* at 1792 (Kennedy, J., concurring) (stating that "[w]e suggest that [the lower courts] must treat [Justice Kennedy's vote] 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").

291. *Id.* (plurality opinion).

292. *Id.* (plurality opinion).

293. *Id.* at 1792–93 (Kennedy, J., concurring).

partisan gerrymandering goes beyond the use of political classifications.[294] In dealing with these issues, the Court faced two obstacles: the lack of comprehensive and neutral principles for drawing electoral boundaries and the lack of rules to limit judicial involvement.[295] The evidence presented by the appellants in *Vieth* did not prevail over these obstacles.[296] The traditional approach of redistricting through the use of contiguity and compactness was limited, especially in terms of constructing a proper remedy.[297] Justice Kennedy viewed the appellants' claim, asserting that a majority of voters should elect a majority of the congressional delegation, as unfounded.[298] However, Justice Kennedy refused to go as far as the plurality in finding all claims of partisan gerrymandering non-justiciable.[299] For Justice Kennedy, the arguments for non-justiciability and the inability to establish a standard did not foreclose further discussion in future cases.[300]

The Fourteenth Amendment standard governed, but Justice Kennedy believed that the First Amendment might provide a more relevant standard to determine unlawful partisan gerrymandering claims.[301] Under First Amendment analysis, Justice Kennedy considered whether political classifications were used to burden a group's representational rights.[302] According to Justice Kennedy, the First Amendment analysis

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294. *Id.* at 1793 (Kennedy, J., concurring) (Stating unconstitutional partisan gerrymandering occurs when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective").

295. *Id.* (Kennedy, J., concurring).

296. *Id.* (Kennedy, J., concurring).

297. *Id.* at 1794. (Kennedy, J., concurring).

298. *Id.* at 1793. (Kennedy, J., concurring).

299. *Id.* (Kennedy, J., concurring). Justice Kennedy refused to follow the plurality even though he thought the plurality had "demostrate[d] the shortcomings of the other standards that have been considered to date." *Id.* at 1794 (Kennedy, J., concurring).

300. *Id.* (Kennedy, J., concurring). ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."). Justice Kennedy believed the Court had already entered the "political thicket" of apportionment through the adoption of the "one person, one vote" rule and therefore should not limit its review of other gerrymandering claims. *Id.* at 1795 (Kennedy, J., concurring). Justice Kennedy argued for caution in closing judicial review especially when the constitutional issue affected a person's right to vote. *Id.* at 1796 (Kennedy, J., concurring). Justice Kennedy worried that if the court abandoned judicial relief to parties, the partisan gerrymanders would be encouraged to enhance their unlawful activities. *Id.* at 1793 (Kennedy, J., concurring).

301. *Id.* at 1797 (Kennedy, J., concurring).

302. *Id.* (Kennedy, J., concurring). Justice Kennedy contrasted this question from the arguments of the plurality. *Id.* (Kennedy, J., concurring). The plurality discounted a First Amendment basis arguing the use "would render unlawful *all* consideration of political affiliation in districting." *Id.* at 1786 (Kennedy, J., concurring). In Justice Kennedy's view, a court could grant relief under the First Amendment if the state "impose[d] burdens and restrictions on groups

provided a greater foundation for courts since it removed the complicated question of when a generally permissible classification is used for impermissible purposes and instead it focused on whether the legislation burdens representational rights based on ideology, beliefs, or political association.[303]

Justice Kennedy noted the apparent contradiction in the plurality opinion that partisan gerrymanders are incompatible with democratic principles.[304] This inconsistency allowed for the possibility of finding manageable standards.[305] While not endorsing a standard proposed by any of the Justices, Justice Kennedy did believe workable standards might emerge in the near future.[306]

3. The Dissenting Opinions

The dissenting Justices agreed on the justiciability of partisan gerrymandering but disagreed as to the proper standards to apply.[307] Justice Stevens focused on Supreme Court precedent involving apportionment and racial gerrymandering claims to develop a standard.[308] Justice Souter discounted all earlier standards developed by the courts and adopted a new method.[309] Justice Breyer argued for a standard to eliminate the unjustified entrenchment of political parties.[310]

a. Justice Stevens's Dissent

For Justice Stevens, the main question in *Vieth* was whether partisan gerrymandering claims were justiciable.[311] Regardless of the different standards proposed, Justice Stevens found it significant that five members of the Court supported the idea that partisan gerrymandering claims were justiciable.[312] Justice Stevens believed that it would be a radical departure from Supreme Court precedent if partisan

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or persons by reason of their view . . . unless the [s]tate shows some compelling interest." *Id.* at 1797 (Kennedy, J., concurring); *see supra*, Part III.C.3 (discussing the use of the First Amendment as a basis to determine unconstitutional partisan gerrymandering).

303. *Vieth*, 124 S. Ct. at 1798 (Kennedy, J., concurring). Justice Kennedy understood this analysis to allow a more "pragmatic or functional assessment that accords some latitude to the States." *Id.* (Kennedy, J., concurring).

304. *Id.* (Kennedy, J., concurring).

305. *Id.* (Kennedy, J., concurring).

306. *Id.* at 1799 (Kennedy, J., concurring).

307. *See infra* Part III.C.3.a (discussing Justice Stevens's dissent); *infra* Part III.C.3.b (discussing Justice Souter's dissent); *infra* Part III.C.3.c (discussing Justice Breyer's dissent).

308. *See infra* Part III.C.3.a (discussing Justice Stevens's dissent).

309. *See infra* Part III.C.3.b (discussing Justice Souter's dissent).

310. *See infra* Part III.C.3.c (discussing Justice Breyer's dissent).

311. *Vieth*, 124 S. Ct. at 1799 (Stevens, J., dissenting).

312. *Id.* (Stevens, J., dissenting).

gerrymandering claims were found to be beyond judicial competence.[313] Illustrated in the dissent, the history and attitude of the Court's involvement in legislative districting disputes mandated a role for the Court.[314] For Justice Stevens, the principles of *Bandemer* and *Baker* confirmed the logic that political gerrymandering claims are justiciable.[315] Justice Stevens believed that the district court ruling should be reversed, but based his decision on narrow grounds dealing only with the single-member district partisan gerrymandering claims.[316]

Justice Stevens dismissed the plurality's claim that judicially manageable standards did not exist.[317] He noted that earlier Supreme Court decisions used a number of factors to determine the validity of districts.[318] Justice Stevens illustrated how courts had used these factors successfully in racial gerrymandering cases.[319] Since a judicially manageable standard existed for racial gerrymandering cases, Justice Stevens believed that the political question doctrine concerns had no merit.[320] For him, the plurality's distinction between racial and

313. *Id.* (Stevens, J., dissenting). "Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification." *Id.* (Stevens, J., dissenting).

314. *Id.* (Stevens, J., dissenting). Justice Stevens stated the main goal of legislative apportionment is to "achiev[e] . . . fair and effective representation for all citizens." *Id.* at 1800 (Stevens, J., dissenting) (quoting from *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

315. *Id.* (Stevens, J., dissenting). Justice Stevens quoted from the portion of *Baker* affirming the holding that "[j]udicial standards under the Equal Protection Clause are well developed and familiar. . . ." *Id.* at 1801 (Stevens, J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Justice Stevens further affirmed the idea that political and racial gerrymandering claims are not distinguishable based on justiciability grounds. *Id.* (Stevens, J., dissenting).

316. *Id.* at 1799 (Stevens, J., dissenting). Justice Stevens believed that statewide claims alleging partisan gerrymandering were too much of an "ambitious project" for the Court to tackle in this case. *Id.* (Stevens, J., dissenting). However, Justice Stevens believed the single district claim alleging partisan gerrymandering were valid. *Id.* (Stevens, J., dissenting). Justice Stevens believed the plaintiff, Susan Furey, established proper standing, that the district-specific claim was not barred by the *Bandemer* rejection of statewide partisan gerrymandering claims, and in regards to her specific electoral district, she articulated a valid Equal Protection claim in line with earlier Supreme Court voting rights cases. *Id.* at 1800 (Stevens, J., dissenting).

317. *Id.* at 1801 (Stevens, J., dissenting).

318. *Id.* (Stevens, J., dissenting). Justice Stevens again used language from *Bandemer* to support his argument. *Id.* (Stevens, J., dissenting). ("[T]he merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting.") (quoting Davis v. Bandemer, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part).

319. *Id.* at 1802 (Stevens, J., dissenting).

320. *Id.* at 1803 (Stevens, J., dissenting). "The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process." *Id.* at 1810 (Stevens, J., dissenting).

partisan gerrymandering in terms of judicially manageable standards lacked credibility.[321] Justice Stevens did not find the distinction based on the plurality's assumption that partisanship is ordinary and lawful valid in terms of justiciability.[322] He also noted that the same basic issue in both racial and partisan gerrymandering claims exists, namely, whether a single, non-neutral issue controlled the creation of the electoral districts in such a manner that it violated the Constitution.[323] Justice Stevens did not believe the plurality had put forth a valid argument distinguishing the difference between racial and partisan gerrymanders.[324]

Justice Stevens then appraised the argument of the appellants.[325] He argued that the statewide claims should be dismissed based on standing.[326] However, Justice Stevens found the specific district challenge warranted review and continued to draw a connection between racial and partisan gerrymanders.[327] Gerrymandering created a cognizable harm by disrupting the relationship between the voter and the elected representative.[328] For Justice Stevens, this harm was even

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321. *Id.* at 1803 (Stevens, J., dissenting).

322. *Id.* (Stevens, J., dissenting). Justice Stevens used a First Amendment argument to show the unconstitutionality of discrimination based on political belief and association. *Id.* (Stevens, J., dissenting); *see* Elrod v. Burns, 437 U.S. 347 (1976) (holding discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny). Justice Stevens drew a parallel between the First Amendment patronage cases to partisan gerrymandering claims. *Vieth*, 124 S. Ct. at 1803–04 (Stevens, J., dissenting) ("[T]he relevant lesson of the patronage cases is that partisanship is not always as benign a consideration as the plurality appears to assume."). Therefore, according to Justice Stevens, political affiliation is not a proper motive to exclude voters from a electoral district. *Id.* at 1803 (Stevens, J., dissenting); *see supra* Part III.C.3 (discussing the use of the First Amendment as a basis to determine unconstitutional partisan gerrymandering).

323. *Vieth*, 124 S. Ct. at 1804 (Stevens, J., dissenting); *see also* Dixon, *One Man, One Vote*, *supra* note 36, at 32 (stating "racial gerrymandering is simply a particular kind of political gerrymandering").

324. *Vieth*, 124 S. Ct. at 1804 (Stevens, J., dissenting). Justice Stevens believed Justice White in *Bandemer* articulated the idea best by stating "[t]hat the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." *Id.* at n. 15 (quoting Davis v. Bandemer, 478 U.S. 109, 125 (1986) (White, J., plurality opinion)).

325. *Id.* at 1805–13 (Stevens, J., dissenting).

326. *Id.* at 1805 (Stevens, J., dissenting). Justice Stevens believed that Court decisions since *Bandemer* had changed the requirements for standing which closed off the appellant's statewide partisan gerrymandering claim. *Id.* (Stevens, J., dissenting); *see also* United States v. Hays, 515 U.S. 737, 745 (1995) (imposing a standing requirement that plaintiffs to reside in the districts they are challenging).

327. *Vieth*, 124 S. Ct. at 1806 (Stevens, J., dissenting).

328. *Id.* (Stevens, J., dissenting). The harm is caused because the elected official in a gerrymandered district "will infer that [ ] success is primarily attributable to the architect of the

greater in the case of partisan gerrymandered districts.[329]

The dissent of Justice Stevens rejected the plurality's notion that partisan considerations are perfectly legitimate.[330] A total elimination of political considerations in the redistricting process was not practicable or necessary.[331] However, the creation of districts must rest on neutral criteria based on the equal protection requirements.[332] In order to assess a challenge to a specific district, Justice Stevens endorsed the standard established in *Shaw* and its progeny.[333] For Justice Stevens, a rational basis test should be used, in place of the strict scrutiny test discussed in *Shaw*, in determining the unconstitutionality of a specific district's plan.[334] Justice Stevens viewed the specific district challenge complaint as falling within this standard and argued for a reversal of the judgment and remand for further proceedings.[335]

b. Justice Souter's Dissent

Justice Souter argued for a five-part test to determine unconstitutional partisan gerrymandering.[336] The concept of fairness framed the question.[337] The interests of fairness were not served because the

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district rather than to a constituency defined by neutral principles." *Id.*

329. *Id.* at 1807 (Stevens, J., dissenting). "The problem simply put, is that the will of the cartographers rather than the will of the people will govern." *Id.*

330. *Id.* at 1801 (Stevens, J., dissenting). Justice Stevens passionately stated:

> [u]ntil today . . . there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line. ON THE CONTRARY, our opinions referring to political gerrymanders have consistently assumed that they were at least undesirable, and we always have indicated that political considerations are among those factors that may not dominate districting decisions.

Id. at 1810–11 (Stevens, J., dissenting) (citations omitted).

331. *Id.* at 1808 (Stevens, J., dissenting).

332. *Id.* (Stevens, J., dissenting). Justice Stevens confirmed the state must act in a neutral manner and the Equal Protection Clause deposits this requirement upon the state. *Id.* Proportional representation of various groups was not the goal of Justice Stevens. *Id.* at 1811 (Stevens, J., dissenting).

333. *Id.* at 1812 (Stevens, J., dissenting); *see supra* Part II.C.4 (discussing the Court development of judicial standards related to racial gerrymandering).

334. *Vieth*, 124 S. Ct. at 1812 (Stevens, J., dissenting). "Under my analysis, if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge." *Id.* (Stevens, J., dissenting). Hence, Justice Stevens believed that the rational basis standard would not place an undue burden on state redistricting processes, but would allow the courts to prohibit extreme partisan plans. *Id.* (Stevens, J., dissenting).

335. *Id.* at 1813 (Stevens, J., dissenting).

336. *Id.* at 1817 (Souter, J., dissenting). Justice Ginsburg joined in Justice Souter's dissenting opinion. *Id.* at 1815 (Souter, J., dissenting).

337. *Id.* at 1815 (Souter, J., dissenting). Justice Souter used the foundation of "fair and

Bandemer plurality's standard set too high a hurdle for the plaintiffs.[338] Justice Souter did not see the lower court's inability to formulate a workable standard as proof that such a standard did not exist.[339] Although Justice Souter agreed partisan gerrymandering was justiciable, he believed that the Court needed to start anew in formulating a manageable standard based on the formula devised in *McDonnell Douglas Corp. v. Green*.[340] Similar to Justice Stevens's approach, Justice Souter limited his test to challenges against specific districts and refused to extend the test to statewide challenges.[341]

Under Justice Souter's test, the plaintiff would need to show five elements in order to establish a *prima facie* case of unconstitutional partisan gerrymandering.[342] The first element required that the plaintiff demonstrate membership within a cohesive political group.[343] Next, the plaintiff would need to satisfy the requirements of standing and show that the created district of the plaintiff's residence paid scant regard to the traditional districting principles.[344] Third, the plaintiff would need to demonstrate a specific correlation between the district's deviations

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effective representation" in describing fairness. *Id.* (Souter, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 162 (1986) (Powell, J., concurring in part and dissenting in part). The Justice believed that everyone understood the term fairness in reference to political gerrymandering cases, but admitted that it did not have the same "hard edge of one person, one vote." *Id.* (Souter, J., dissenting).

338. *Id.* at 1816 (Souter, J., dissenting). Justice Souter viewed the interpretation of *Bandemer* as requiring a showing of a group to be "essentially . . . shut out of the political process" in order to prove discriminatory effect to constitute an excessive burden. *Id.* (Souter, J., dissenting) (quoting *Bandemer*, 478 U.S. at 139); *see supra* Part II.E (discussing the Supreme Court decision of Davis v. Bandemer, 478 U.S. 109 (1986)).

339. *Vieth*, 124 S. Ct. at 1816 (Souter, J., dissenting). Justice Souter thought the Court created the problem in the first place, and therefore it was the responsibility of the Court to resolve it. *Id.*

340. *Id.* at 1817 (Souter, J., dissenting); *see supra* note 64 (discussing the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) burden-shifting standard).

341. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting). "I would limit consideration of a statewide claim to one built upon a number of district-specific ones." *Id.* at 1820 (Souter, J., dissenting).

342. *Id.* at 1817 (Souter, J., dissenting).

343. *Id.* (Souter, J., dissenting). Justice Souter rebuffed the plurality's claim that a person's political identity is rarely discernible. *Id.* (Souter, J., dissenting); *see supra* Part III.C.1 (discussing plurality's view). The fact that political gerrymandering occurs implies that the political gerrymander was able to identify relevant groups and establish district boundaries to its benefit or determent. *Vieth*, 124 S. Ct. at 1817 n.2 (Souter, J., dissenting).

344. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting); *see* United States v. Hays, 515 U.S. 737 (1995) (requiring residence in a challenged district for standing). Justice Souter referred to "contiguity, compactness, respect for political subdivisions, and conformity with geographic features" as principles of traditional districting. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting). According to Justice Souter, an exact formula that balanced the principles was not required, since courts have been able to make these determinations in earlier decisions and the specific type of method used to gerrymander is case specific. *Id.* at 1818 (Souter, J., dissenting).

from traditional districting principles and political group's population distribution.[345] The fourth element required the plaintiff to present a hypothetical district, which included his residence, more in line with the traditional principles of redistricting.[346] Finally, the plaintiff would need to show that the gerrymander acted with intent to discriminate.[347] Once the prima facie case is established, the burden would shift to the alleged gerrymander.[348] The alleged gerrymander would need to show the district was created for reasons beyond naked partisan advantage.[349]

Justice Souter discounted the plurality's claims that the test did not provide manageable standards.[350] The test was not hard-edged, but it was also not wholly subjective.[351] A precise measure of the harm was not necessary since all of the Justices agreed partisan gerrymandering taken too far is unfair.[352] The test provided a method that would assist the Court in determining when a partisan gerrymander had gone too far.[353] Justice Souter believed that the right course would be to reverse the district court and allow the plaintiff to amend the district-specific complaint in compliance with the test.[354]

c. Justice Breyer's Dissent

345. *Vieth*, 124 S. Ct. at 1818 (Souter, J., dissenting). Justice Souter provided possible examples including a showing that "when towns and communities were split, Democrats tended to fall on one side and Republicans on the other." *Id.* (Souter, J., dissenting).

346. *Id.* at 1817 (Souter, J., dissenting). For example, the proposal should have a lower or higher proportion of the plaintiff's group based on the method employed to dilute the vote. *Id.* at 1819 (Souter, J., dissenting); *see also supra* Part II.A.1 (discussing the different methods of a political gerrymander).

347. *Vieth*, 124 S. Ct. at 1819 (Souter, J., dissenting). Justice Souter did not think that meeting this element was difficult, especially with a plan devised by a single major party and if the plaintiff satisfied the third and fourth elements of the prima facie case. *Id.* (Souter, J., dissenting).

348. *Id.* (Souter, J., dissenting).

349. *Id.* (Souter, J., dissenting). Such reasons could include the avoidance of racial vote dilution, complying with the one person, one vote requirement or proportional representation among its political parties. *Id.* at 1817 (Souter, J., dissenting); *see* Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) (finding compliance with section 2 of the Voting Rights Act of 1965 is a compelling state interest).

350. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting); *see supra* note 285–84 and accompanying text (discussing the plurality's criticism of Justice Souter's plan).

351. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting).

352. *Id.* (Souter, J., dissenting). Justice Souter even quoted Justice Scalia showing exact determinations are not always necessary. *Id.* at 1822. "To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice – but it is just one of a number of competing values." *Id.* at 1822 (Souter, J., dissenting) (quoting from Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989)).

353. *Vieth*, 124 S. Ct. at 1821 (Souter, J., dissenting).

354. *Id.* at 1822 (Souter, J., dissenting).

In his dissent, Justice Breyer asserted the idea that fair and effective representation included more than just having equally populated electoral districts.[355] A proper process must exist that allows for the will of the majority to establish an effective government.[356] Political parties and single member districts play an important role in this process.[357] For Justice Breyer, political parties function as a way for voters to express satisfaction or dissatisfaction with the elected officials' views by allowing voters to support them or vote for another party.[358] Due to the role of political parties, Justice Breyer found it natural that politics would play a role in the creation of electoral districts.[359] Justice Breyer did not believe traditional districting principles were politically neutral.[360]

The "unjustified entrenchment" of political parties served as the focal point for Justice Breyer's opinion.[361] This type of entrenchment would make it difficult for voters to remove elected officials who were no longer in line with the majority of the voters' views.[362] Court intervention would not always be necessary since other procedural solutions existed for the non-entrenched political party.[363] However, Justice Breyer did not have complete faith in the non-judicial remedies

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

356. *Id.* at 1822–23 (Breyer, J., dissenting).

357. *Id.* at 1823 (Breyer, J., dissenting). In addition to providing greater legislative stability, Justice Breyer viewed single member districts as facilitating the ability of the voter to identify the party in power and decide if the voter wants to maintain the party power or vote them out of office. *Id.* (Breyer, J., dissenting).

358. *Id.* (Breyer, J., dissenting).

359. *Id.* (Breyer, J., dissenting). Justice Breyer believed it was necessary for politics to play a role in electoral districting since a random creation may create a larger exaggeration in election results and possibly may eliminate minority party representation. *Id.* at 1824 (Breyer, J., dissenting).

360. *Id.* (Breyer, J., dissenting). Justice Breyer viewed these boundaries as based on traditional principles, "represent[ing] a series of compromises of principle" and "an uneasy truce, sanctioned by tradition, among different parties seeking political advantage." *Id.* (Breyer, J., dissenting). *But see* Dixon, *One Man, One Vote*, *supra* note 36, at 35 (finding "[t]he idea of a so-called nonpartisan or neutral commission offers no certain path to representational virtue. Indeed, it is essentially a 'three monkeys' policy: speak no politics, see no politics, hear no politics, and hope that men are angels").

361. *Vieth*, 124 S. Ct. at 1825 (Breyer, J., dissenting). Justice Breyer defined unjustified entrenchment as the ability of the minority to maintain power "purely [as] the result of partisan manipulation and not other factors." *Id.* (Breyer, J., dissenting).

362. *Id.* (Breyer, J., dissenting). ("[P]olitical gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification.").

363. *Id.* at 1826. (Breyer, J., dissenting). Justice Breyer viewed statewide officials, Congress and voters as agents that could negate the power of the gerrymander. *Id.* (Breyer, J., dissenting). Justice Breyer also discussed the use of state commissions to limit the extent of partisan gerrymandering. *Id.* (Breyer, J., dissenting).

available to a gerrymandered voter.[364] Justice Breyer expressed concern that new technology would allow an entrenched gerrymander to maintain its position of unjust power.[365] Thus, under these circumstances, court action would be justified.[366]

Justice Breyer had faith that courts would be able to identify unjustified entrenchment and design a remedy for extreme cases.[367] While the determination by the Court would not be an easy one, Justice Breyer believed it was possible.[368] Finally, Justice Breyer challenged the assertion of the plurality that maintained that the numerous proposed standards implied a workable standard did not exist.[369] Justice Breyer believed that the Court, when writing a majority opinion, would be able to reconcile their differences and select a majority standard.[370]

IV. ANALYSIS

The majority of Justices in *Vieth* correctly affirmed that partisan gerrymandering claims are justiciable.[371] Part IV.A endorses the idea that the Justices were correct in confirming the justiciability of partisan

364. *Id.* (Breyer, J., dissenting). "[W]e cannot always count on a severely gerrymandered legislature itself to find and implement a remedy." *Id.* (Breyer, J., dissenting). "The party that controls the process has no incentive to change it." *Id.* at 1826–27. (Breyer, J., dissenting).

365. *Id.* at 1827. (Breyer, J., dissenting). ("The availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins . . . .").

366. *Id.* (Breyer, J., dissenting).

367. *Id.* (Breyer, J., dissenting). Justice Breyer highlighted the fact that after the 1980 census about one third of all redistricting was done either directly by the courts or under the courts' injunctive authority. *Id.* (Breyer, J., dissenting); *see* Samuel Issacharoff & Karlan, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1688–90, & nn. 227–33 (1993) (observing that following the 1980 census, federal courts played an active role in identifying and remedying unjustified redistricting plans).

368. *Vieth*, 124 S. Ct. at 1827–28 (Breyer, J., dissenting). In order to show that the Court could determine unjustified entrenchment, Justice Breyer provided a number of hypothetical examples of what he would consider unconstitutional partisan gerrymandering. *Id.* at 1828. (Breyer, J., dissenting). These hypothetical examples illustrated his belief that a fair inference of unconstitutional redistricting may arise in circumstances where a majority has twice failed to win a majority of legislative seats, where there is a radical departure from traditional boundary-drawing criteria, or where there has been unjustified mid-cycle redistricting. *Id.* (Breyer, J., dissenting).

369. *Id.* at 1829 (Breyer, J., dissenting).

370. *Id.* (Breyer, J., dissenting) ("[T]he more thorough, specific reasoning that accompanies separate statements will stimulate further discussion."). Justice Breyer believed the discussion necessary especially since Justice Kennedy continued to search for an appropriate standard. *Id.* (Breyer, J., dissenting) ; *see* Issacharoff & Karlan, *supra* note 12 at 561 (noting the dissenting opinions included "many common threads").

371. *See supra* Part III.C.2–3 (discussing each Justice's view on the justiciability of redistricting challenges).

gerrymandering claims.[372] Part IV.B reviews the dissenting opinions of *Vieth*, demonstrating some of their limitations.[373] Part IV.C argues that Justice Stevens's proposed standard provides the most promising judicial approach to settling partisan gerrymandering claims.[374]

A. Maintaining a Foundation: Justiciability Confirmed

The Court's affirmation of justiciability was correct because none of the factors established in *Baker*, which decide political questions, relate to partisan gerrymandering.[375] The Congressional authority to alter regulations related to elections does not remove the issue from the Court's jurisdiction.[376] In arguing non-justiciability, the main focus for the plurality was the lack of judicially discoverable and manageable standards for resolving the question of partisan gerrymandering.[377] Since *Baker*, Court precedent clearly shows that discoverable standards exist to resolve these claims under the Fourteenth Amendment.[378] The idea that the Court might have to expressly create a specific test is not new ground for the Court.[379] The prior development of a manageable standard by the Court in racial gerrymandering cases makes the Court's task that much easier.[380] The Court has already been able to distinguish

372. *See infra* Part IV.A (discussing the correctness of the majority of Justices who reaffirmed partisan gerrymandering claims as justiciable).

373. *See infra* Part IV.B (discussing the different formulations of the Justices but concluding each one lacks a certain element).

374. *See infra* Part IV.C (discussing the reasoning for applying Justice Stevens's proposed standard to partisan gerrymandering claims).

375. *See supra* note 86 (discussing the factors and analysis necessary to determine whether a particular issue constitutes a political question); *supra* notes 196–97 and accompanying text (discussing the Supreme Court's application of *Baker's* factors to partisan gerrymandering in *Davis v. Bandemer*, 478 U.S. 109 (1986), finding that none of them applied to partisan gerrymandering).

376. Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light — or at Least a Yellow Light*, FIND LAW'S WRIT, *at* http://writ.findlaw.com/dorf/20040512.html (last visited May 12, 2004).

377. *See id.* (defining *discoverable standards* as those that can be traced to the Constitution's text, structure, or history, and *manageable standards* as those that lead to predictable and sensible results).

378. *See supra* note 101 (discussing the application of the Fourteenth Amendment to vote dilution cases). The *Baker* majority held that "[j]udicial 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, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. 226; *see* Baker v. Carr, 369 U.S. 186, 226 (1962).

379. *See* Dorf, *supra* note 376 (arguing that in almost in every area of Constitutional law, the Court has established certain tests in order to enforce rights described in generalities by the Constitution).

380. *See supra* notes 145–48 and accompanying text (discussing the *Gingles* three prong test).

predominance on the basis of race in the creation of electoral districts.[381] In establishing a majority standard, the Court's charge will be to determine how to measure whether the predominant factor in the creation of electoral district boundaries was based on partisan politics which subordinated traditional districting principles.[382]

Beyond the creation of uniform standards, the Court has a necessary role in resolving disputes because of the cognizable harm partisan gerrymandering causes voters.[383] The goal of the partisan gerrymander is to discriminate against a particular group.[384] This discrimination violates the constitutional requirement of fair and effective representation established through Supreme Court precedent.[385] A lack of fair and effective representation reduces the overall stability of the government by encouraging greater voter apathy and indifference.[386] Partisan gerrymandering reduces the opportunity for genuinely contested general elections and places greater emphasis on primary elections, where most voters belong to the extreme partisan edge of the political party.[387] The domino effect of gerrymandering creates a more polarized House of Representatives and reduces cooperation and consensus building between parties.[388] The Supreme Court has an important role in remedying these harms and the corresponding

381. *See supra* notes 154–67 and accompanying text (discussing the *Shaw* line of cases that established and identified traditional principles for district plans and unconstitutional violations of those principles based on race).

382. *See* Dorf, *supra* note 376 (comparing partisan gerrymandering cases to racial gerrymandering cases and pointing out that in ruling on racial gerrymandering cases the Court did not simply ask whether race was a factor, but instead asked if race was the predominant factor).

383. *See* Lewyn, *supra* note 35, at 407–09 (discussing the harm caused by partisan gerrymandering); Samuel Issachroff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (exploring how partisan gerrymandering allows dominant parties to lock up political institutions to forestall competition); Sasha Abramsky, *The Redistricting Wars*, THE NATION, Dec. 29, 2003, at 15 (arguing the inaction of the Supreme Court will most likely result in a Republican stranglehold on the House of Representatives for the rest of the decade due to the party's ability to gerrymander the district maps in certain states). *But see* Carvin, *supra* note 62, at 4–5 (arguing partisan gerrymandering does not create a harm to voters since the person's right to vote is not violated).

384. *See supra* Part II.A.1 (defining gerrymandering and introducing its basic operation and effect).

385. *See* Part II.C.3 (discussing the issue of fair and effective representation).

386. Ortiz, *supra* note 56, at 478–86; *see supra* notes 55–65 and accompanying text (discussing recent outcomes and effects of partisan gerrymandering). Some commentators believe the decline of competitive races and long periods of one-party control of the House erodes the accountability and legitimacy of the chamber. *E.g.*, Hirsch, *supra* note 58, at 179 (arguing partisan gerrymandering reduces political fairness, accountability and responsiveness).

387. Toobin, *supra* note 7, at 64.

388. *Id.*

results.[389] Therefore, the Court's confirmation that partisan gerrymandering claims are justiciable is proper.[390]

B. Possible Foundations: The Dissenting Opinions of Vieth

Vieth did put an end to the impossibly high standard of *Bandemer*, but it still left the lower courts searching for the proper standard to apply.[391] A majority of the Justices found partisan gerrymandering claims justiciable, but quickly divided over the proper standard to apply in these cases.[392]

Justice Kennedy provided the swing vote in the *Vieth* decision.[393] Justice Kennedy concurred in the opinion, but he refused to follow the reasoning of the plurality, which consequently, made his opinion read more like a dissent.[394] While Justice Kennedy refused to endorse a specific standard, his opinion did provide insight as to possible standards that would be satisfactory.[395] Justice Kennedy focused on First Amendment protections, finding them to possess the necessary elements to determine unconstitutional partisan gerrymandering.[396] According to Justice Kennedy, the First Amendment analysis provided

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389. Henry J. Stern, *Political Gerrymander Upheld in 5–4 Supreme Court Decision*, New York Civic, at http://www.nycivic.org/articles/040429.html (last visited Apr. 29 2004).

390. *See* Part II.C (discussing the Court's expansion of justiciable apportionment related issues to include partisan gerrymandering).

391. Charles Lane, *Justices Order New Look at Texas Redistricting Case*. WASH. POST, Oct. 19, 2004, at A21. "*Vieth* was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." *Id.* (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles); *see supra* Part II.E.3 (discussing the application of the *Bandemer* standard by the lower courts).

392. Vieth v. Jubelirer, 124 S. Ct. 1969, 1810 (2004) (Stevens, J., dissenting); *Id.* at 1817 (Souter, J., dissenting); *Id.* at 1825 (Breyer, J., dissenting); *see supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion); *supra* Part III.C.3.b (discussing Justice Souter's dissenting opinion); *supra* Part III.C.3.c (discussing Justice Breyer's dissenting opinion).

393. *Vieth*, 124 S. Ct. at 1792–93 (Kennedy, J., concurring); Richard L. Hasen, *Looking For Standards (In All the Wrong Places): Partisan Gerrymandering Claims After* Vieth, 3 ELECTION L.J. 626, 627 (2004).

394. *See* Hasen, *supra* note 393, at 640–41 (analyzing the *Vieth* decision and in particular Justice Kennedy's concurrence). "Justice Kennedy's concurrence has the virtue of shaking up the thinking in this area, throwing out a standard that no one on the current Court defends and that was no help to plaintiffs, and leaving the door open for future challenges." *Id.* at 641.

395. *Id.* Justice Kennedy suggested satisfactory standards might eventually emerge from "helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies," through better computer technology, or through an analysis of the "First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 124 S. Ct. at 1794–97 (Kennedy, J., concurring).

396. *Vieth*, 124 S. Ct. at 1797–98 (Kennedy, J., concurring); *see supra* Part III.C.2 (discussing Justice Kennedy's view of the First Amendment in resolving partisan gerrymandering claims).

a greater foundation for courts since it removed the complicated question of when a generally permissible classification is used for impermissible purposes and instead it focused on whether the legislation burdens representational rights based on ideology, beliefs, or political association.[397] By not fully joining the plurality, Justice Kennedy kept alive the voters' ability to challenge partisan gerrymandering, but he stopped short of endorsing a standard, which future courts could follow.[398]

On the other hand, Justice Souter's dissenting opinion introduced a completely new method of measuring unconstitutional partisan gerrymandering claims.[399] This standard, based on the *McDonnell Douglas* burden shifting method, may be the most familiar to litigants.[400] However, the standard completely ignores the development of the jurisprudence related to disputes over apportionment.[401] Acts of racial and political gerrymandering are closely related.[402] The creation of two distinctly different standards to measure closely related unconstitutional acts would only create further confusion for the courts.[403] A suitable standard for partisan gerrymandering should therefore build upon earlier Court decisions dealing with apportionment and racial gerrymandering.[404]

Justice Breyer's opinion deplored partisan gerrymandering.[405] The

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397. *Vieth*, 124 S. Ct. at 1798 (Kennedy, J., concurring). Justice Kennedy understood this analysis to allow a more "pragmatic or functional assessment that accords some latitude to the States." *Id.*

398. *See* Hasen, *supra* note 393, at 641 ("It is easy to criticize Justice Kennedy's concurrence, for it puts plaintiffs in an impossible position. It tells them that if they file partisan gerrymandering suits, they are almost certain to lose, unless they can come up with a partisan gerrymandering standard that meets underspecified and somewhat contradictory criteria.").

399. *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting).

400. *See* Hasen, *supra* note 393, at 639. ("Justice Souter's standard, with its familiar vote dilution concepts and burden shifting borrowed from employment law cases, would lead to the most consistent results across cases. . . .").

401. *Vieth*, 124 S. Ct. at 1815–22 (Souter, J., dissenting). Justice Souter believed it was time to "start anew" in solving these claims. *Id.* at 1817.

402. *See* Mike Clark-Madison, *Meanwhile, at the Supreme Court. . .*, AUSTIN CHRON., Dec. 19, 2003 (observing that if the gerrymander can convince the courts that the gerrymandered plan did not intend to disenfranchise racial minority voters, even though minority voters are almost all Democrats, the plan may pass constitutional muster).

403. *See, e.g.*, Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L. J. 283, 333 (1988) (arguing that a failure of circuit courts to develop a coherent constitutional standard frustrates the Fourth Amendment's constitutional restraint on unreasonable police behavior).

404. *See* Hasen, *supra* note 393, at 639 ("What should be clear, however, is that just because a test is easily administrable and therefore likely to lead to roughly consistent results in the courts on similar sets of facts is not reason enough to adopt it.").

405. *Vieth*, 124 S. Ct. at 1822 (Breyer, J., dissenting). *See supra* Part III.C.3.c (discussing

opinion focused on the structural terms of voting and found that the self-interest of elected state legislators can undermine a healthy democratic process.[406] Further, Justice Breyer listed a series of methods used by gerrymanders that could create unconstitutional redistricting plans.[407] In identifying these he described the components of a well-functioning democracy instead of a specific standard to determine violations.[408] Due to Justice Breyer's lack of specific standards, the opinion did not provide the proper foundation for lower courts to measure unconstitutional partisan gerrymandering.[409]

C. Foundation for the Future: Justice Stevens's Standard

Justice Stevens's dissenting opinion provides a foundation to establish proper standards.[410] Justice Stevens correctly built upon the Court's racial gerrymandering cases as a foundation for resolving partisan gerrymandering claims.[411] The racial gerrymandering standards balance the constitutional requirements with the compelling state interest of affirmatively protecting the rights of minority voting groups.[412] As Justice Stevens highlights, courts have been able to establish effective methods of identifying and remedying redistricting plans when this balance has tipped in the wrong direction.[413] Applying racial gerrymandering precedents to partisan gerrymandering is appropriate because regardless of the type of gerrymandering, the result is the same: the promotion of voting power of one group over another.[414] In addition, the standard can still be sufficiently stringent so that courts will not be involved in every redistricting process, but will still be able to intervene when partisan gerrymandering has gone too

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Justice Breyer's dissenting opinion).

406. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 510 (2004).

407. *Vieth*, 124 S. Ct. at 1828 (Breyer, J., dissenting).

408. *Id.* at 1828–29 (Breyer, J., dissenting).

409. *Id.* at 1788–89 (plurality opinion). Without much discussion, the plurality dismissed Justice Breyer's standard as extremely vague. *Id.* at 1789 (plurality opinion) ("[W]e neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.").

410. *See supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion).

411. *Id.*

412. *See supra* Part II.C.4 (discussing the standards of justiciability applied to racial gerrymandering).

413. Issacharoff & Karlan, *supra* note 12, at 561–62; *see supra* Part II.C.4 (discussing relevant Supreme Court cases providing protection from vote dilution).

414. *See supra* Part II.A.2 (discussing the harm caused by partisan gerrymandering, especially the reduction in competitive elections); *supra* Part III.C.3a (discussing Justice Stevens's dissenting opinion)

far.[415]

V. IMPACT

At first, the ruling in *Vieth* appears to increase the difficulty for plaintiffs challenging partisan gerrymandering claims.[416] Part V.A argues that in the short term, partisan gerrymandering will remain unchecked by the courts.[417] The decision might increase the call for a proportional electoral system or other grassroots changes to the electoral system.[418] Part V.B asserts that in the long term *Vieth* will help establish a manageable standard and focus on areas of constitutional law that were not historically considered applicable to partisan gerrymandering claims.[419]

A. Short Term Confusion

Four Justices in *Vieth* revisited the justiciability of partisan gerrymandering claims.[420] The plurality found no judicially manageable standards applicable to partisan gerrymandering claims and invoked the political question doctrine.[421] However, no foundation existed to reapply the political question doctrine to partisan gerrymandering claims.[422] Unfortunately, this posture may encourage

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415. Issacharoff & Karlan, *supra* note 12, at 561–62.

416. *The Court Punts*, WASH. POST, May 2, 2004, at B06. ("The consequence of the splintered decision is that political gerrymandering suits remain a theoretical possibility. . . .").

417. *See infra* Part V.A (discussing the short term impact of *Vieth*).

418. *See* John B. Anderson & Robert Richie, *A Better Way to Vote*, LEGAL TIMES, May 17, 2004, at 68 (explaining that a proportional system of government will provide great accountability and competition); Patrick Mulvaney, *Not Quite an Exact Portrait*, THE NATION, *at* http://www.thenation.com/doc.mhtml?i=20041115&c=1&s=mulvaney (Oct. 28, 2004) (calling for proportional representation as is currently used in Germany, Portugal, Switzerland and Greece).

419. *See infra* Part V.B (discussing the long term impact of *Vieth*).

420. *See supra* Part III.C.1 (discussing the plurality opinion). The plurality did not simply raise the issue of justiciability, but argued that the lower court should treat this view as the majority view due to Justice Kennedy's reasoning. *See supra* note 290 (quoting the plurality's suggestion that lower courts treat Justice Kennedy's vote as a reluctant fifth vote for non-justiciability).

421. *See* RUSH, *supra* note 35, at 13 (arguing that the Court has been unable to develop manageable standards due to incorrect assumptions regarding individual and group voting behavior and questionable or unclear references to constitutional amendments); *see also supra* Part III.C.1 (discussing the plurality opinion); *supra* Part II.B (discussing the political question doctrine).

422. Issacharoff & Karlan, *supra* note 12, at 543; *see* Herman Schwartz, *Out with Gerrymanders!*, THE NATION, *at* http://www.thenation.com/doc.mhtml?i=20040719&s=schwartz (July 1, 2004) ("Most of Scalia's questions are bogus and have already been answered."); *see also supra* Part II.C (discussing the Court's progress in establishing manageable standards).

district court judges to dismiss partisan gerrymandering claims on justiciability grounds.[423]

Overall, in the short term, the decision will neither alter the acts of the partisan gerrymander nor the struggle to stop it.[424] The decision in *Cox v. Larios* essentially represents where litigants find themselves in the wake of *Vieth*.[425] In *Cox*, the district court found the redistricting plan unconstitutional based on the one person, one vote principle of the Equal Protection Clause.[426] The district court rejected the partisan gerrymandering claim, finding *Bandemer* still controlling.[427] The Supreme Court summarily affirmed the decision, seeming to base the decision on the one person, one vote rule.[428] As illustrated in *Cox*, due to the inability of the Court in *Vieth* to definitively affirm the standards

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423. *See* Shapiro v. Berger, 328 F. Supp. 2d 496, 504 (S.D.N.Y. 2004) (finding *Vieth* limited the scope of justiciability for claims of partisan gerrymandering); *supra* Part II.B (discussing the grounds of justiciability). *See generally*, Hasen, *supra* note 393 (examining the *Vieth* opinion and concluding that people aggrieved by partisan redistricting should seek political rather than judicial remedies).

424. *See* Lane, *supra* note 391, at A21 ("*Veith* was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said there is no standard by which to judge them." (quoting Richard Hasen, election law specialist, Loyola Law School in Los Angeles)).

425. Cox v. Larios, 124 S. Ct. 2806 (2004). The Supreme Court rendered a decision on June 30, 2004, only a few months after the *Vieth* decision. *Id. See supra* notes 13 and 55 (discussing the *Cox* case). *But see* Steven F. Huefner, *The Current Status of One-Person-One-Vote: An Overview*, ELECTION LAW @ MORTIZ, *at* http://moritzlaw.osu.edu/electionlaw/districts_reapp.html (last visited May 27, 2005) (arguing the *Cox* decision questions the validity that small deviations will still be tolerated by the Court).

426. *Cox*, 124 S. Ct. at 2806 (Stevens, J., concurring). The reasons for the deviations included "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas" and "an intentional effort to allow incumbent Democrats to maintain or increase their delegation." *Id.* (Stevens, J., concurring) (quoting Larios v. Cox, 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004)). The district court did not find these reasons justified deviation from the one person, one vote principle. *Id.* at 2807–08. (Stevens, J., concurring).

427. *Id.* at. 2808 (Stevens, J., concurring). The district court determined the Republicans had not been shut out of the political process. *Id.* (Stevens, J. concurring). Justice Stevens asserted the factual findings of the district court confirmed that an impermissible partisan gerrymander is "visible to the judicial eye and subject to judicially manageable standards." *Id.* (Stevens, J., concurring).

428. *Id.* Justice Stevens, writing for the Court, held "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." *Id.* Justice Scalia, in dissent, argued against summarily affirming. *Id.* at 2809 (Scalia, J., dissenting). Justice Scalia asserted that "politics as usual" may fall within a traditional districting principle and therefore questioned if the Georgia plan violated the Constitution. *Id.* (Scalia, J., dissenting). However, a summary affirmance normally indicates that the lower court got the result right, but not necessarily that it used the correct reasoning. Ill. State. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979). Justice Stevens wrote that, even though the issue was not raised by appellants in *Cox*, the Georgia districting plan constituted an unconstitutional partisan gerrymander under Justice Breyer's standards set forth in *Vieth*. *Cox*, 124 S. Ct. at 2808 (Stevens, J., concurring).

of an unconstitutional partisan gerrymandering, the Court is brought back to the *Karcher* outlook of striking down a redistricting plan based on the one person, one vote standard while arguing in dictum that the plan is an unconstitutional gerrymander.[429]

B. Long Term Benefit

Vieth did not resolve the question left open in *Bandemer*, namely, what are the judicially manageable standards to adjudicate partisan gerrymandering claims.[430] However, the Court in *Vieth* did provide more realistic standards then the Court in *Bandemer*.[431] *Vieth*'s importance lay in the fact that it ended the impossibly high standards required to challenge a partisan gerrymandering plan.[432] Furthermore, the decision opened new avenues to explore in creating judicially manageable standards.[433] The decision will allow lower courts to adopt different standards to settle these disputes.[434] The Court's desire for lower courts to move beyond *Bandemer* and use the discussion in *Vieth* to foster new thoughts is demonstrated by the Court's recent announcement in *Jackson v. Perry*.[435] In *Jackson*, the Court granted a motion for the district court to reconsider its approval of the Texas 2002 Congressional redistricting plan using *Vieth* as a basis for the

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429. Issacharoff & Karlan, *supra* note 12, at 566–67.

430. *See* Stephen E. Gottlieb, *In* 'Vieth,' *Court Continues to Misunderstand Gerrymandering*, N.Y.J.J. (arguing the Justices are unable to develop a proper standard because they fail to understand the political science principles of symmetry) *available at* http://www2.als.edu/faculty/sgottlieb/vieth.pdf (Aug. 19, 2004) at 4.

431. *See supra* Part II.E (discussing the Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

432. Johnson-Lee v. City of Minneapolis, No. 02-1139, 2004 U.S. Dist. LEXIS 19708, at *37 (D. Minn. Sept. 30, 2004) (concluding *Vieth* effectively overruled *Bandemer* since a majority of the Justices found the *Bandemer* standard unmanageable); *see* Hasen, *supra* note 393, at 626 (observing that the standard announced in *Bandemer* was nearly impossible for plaintiffs to meet).

433. Vieth v. Jubelirer, 124 S. Ct. 1769, 1829 (2004) (Breyer, J., dissenting) (suggesting a through discussion of the relevant theories might lead to a better understand of a workable standard). At least one commentator believes *Vieth* represents an invitation to litigants to work at the state constitutional level to develop a nationwide consensus about how such claims should be handled. James A. Gardner, *A Post-*Vieth *Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643–44 (2004).

434. *See supra* Part II.E.3 (discussing attempts by the lower courts to interpret *Bandemer*); *see also* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) (arguing that a procedural rule limiting the frequency of redistricting to a ten year cycle will promote partisan fairness).

435. Jackson v. Perry, 125 S. Ct. 351 (2004) (mem.) *vacating* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex 2004) (remanding for reconsideration based on *Vieth* a district court apprival of the Texas redistricting plan); *see supra* notes 59–63 (discussing the situation in Texas).

reconsideration.[436]

Based on *Vieth*, an additional avenue to determine manageable standards in order to regulate partisan gerrymanders could include the application of the First Amendment right of association.[437] In the past, courts mainly focused on the Equal Protection Clause to provide protection to gerrymandered voters while ignoring some of the important First Amendment protections.[438] Justices Kennedy and Stevens both mentioned First Amendment rights as a possible constitutional standard to resolve partisan gerrymandering.[439] As a result, courts may now give greater consideration to the First Amendment in providing a foundation to manage partisan gerrymandering disputes.[440]

VI. CONCLUSION

The majority of the Justices correctly affirmed the justiciability of partisan gerrymandering cases in *Vieth*. Although the majority failed to provide a clear standard for the lower courts, the Justices properly

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436. Lane, *supra* note 391, at A21. The Supreme Court ordered the three-judge panel to review its January decision allowing a gerrymandered congressional districting plan to be implemented. *Id.* The action will not affect the 2004 election in Texas. *Id.* The Supreme Court told the district court to take account of the *Vieth* decision in deciding the partisan gerrymandering claims. *Id.* The decision allows the Court to avoid making a decision during the 2004 election cycle, but still deal with the issue. *Id. But see* Paul Rosenzweig, *Some Wishful Thinking on Texas Redistricting*, THE HERITAGE FOUNDATION PRESS ROOM, *at* http://www.heritage.org/Press/Commentary/ed102704c.cfm (October 27, 2004) (arguing the Court uses this procedure on a regular basis and "it means absolutely nothing about the merits of the case").

437. *See* Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968), stating two kinds of rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (affirming that "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas").

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.

Id. at 358.

438. Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1212–13 (2003).

439. *See supra* Part III.C.2 (discussing Justice Kennedy's opinion); *supra* Part III.C.3.a (discussing Justice Stevens's dissenting opinion).

440. Schwartz, *supra* note 422 ("Thanks to Anthony Kennedy and the Court's unanimous rejection of the *Bandemer* tests, lawyers and the lower courts can still attack severe partisan gerrymandering and now have a promising First Amendment approach."); *see supra* note 226 (discussing the role of the First Amendment as a protection against partisan gerrymandering).

repudiated Justice White's plurality opinion in *Bandemer*, which set an exceedingly difficult standard for proving a claim of illegal partisan gerrymandering. Justice Stevens's dissenting opinion in *Vieth* provides the best guidance for the lower courts and should be adopted. In the short term, the jurisprudence of partisan gerrymandering will most likely not change dramatically. However, the decision in *Vieth* will continue the search for judicially manageable standards. The uncertainty in the proper standards to apply in partisan gerrymandering case may not have been fully resolved in *Vieth*, but the decision will slowly remove the uncertainty.